79-692

SUPREME COURT
OF THE UNITED STATES

No. _____

October Term, 1979

HENRY SCHWARTZE, et al.

Petitioners

vs.

EMIL WENZ, et al.,

Respondents

PETITION FOR WRIT OF CERTIORARI
TO THE
SUPREME COURT OF MONTANA
Decision: August 1, 1979

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TO THE SUPREME COURT OF MONTANA

TO THE HONORABLE WARREN E. BURGER, CHIEF JUSTICE OF THE UNITED STATES, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT:

Comes now the Petitioners, HENRY SCHWARTZE, et al by their attorneys Roger S. Hanson, and Jerome Kessler, Members of the bar of the United States Supreme Court, asking for a writ of certiorari directed to the Supreme Court of Montana, to review that certain published opinion, EMIL WENZ, et al., vs. DIANE SCHWARTZE, et al,598 P.2d 1086 a copy of which is herewith attached to this petition for certiorari.

Pursuant to Rule 23, Rules of the Supreme Court of the United States, petitioners submit the following:

(a)

OPINION BELOW

The official report of the judgement herein sought review is EMIL WENZ, et al., v. DIANE SCHWARTZE, et al, 598 P.2d 1086 dated August 1, 1979. A copy of that opinion is attached as Appendix "A".

(b)

JURISDICTION

The grounds upon which the jurisdiction of this Honorable Court is invoked are:

(i) the opinion from which certiorari is sought was entered August 1, 1979.

(ii) the statutory provision conferring jurisdiction on this Honorable Court is 28 U.S.C. 1257 (3) which provides:

Final judgements or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

. . . .By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes or, commission held or authority exercised under the United States, June 25, 1948, c. 646, 62 Stat. 927.

(c)

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Full Faith and Credit Clause of the United States Constitution, Article IV, Section I,

   " . . . Full Faith and Credit shall be given in each state to the public acts, records and judicial proceedings of every other state . . ."

   applies to child custody decrees between 2 states adopting and recognizing the Uniform Child Custody Jurisdiction Act, a case of first impression never having been explicitly resolved by this Honorable Court.
2. Whether this Honorable Court shall decree that the State of Montana must, under the United States Constitution give Full Faith and Credit to an extant child custody decree of the state of California where said states, Montana and California, have both enacted the Uniform Child Custody Jurisdiction Act at the time of the Montana adjudication?
3. Whether an **aunt and an uncle,** living in Montana, acquire legal "physical custody" of a child during a five-day visit of that child, where that child, a legal and lawful resident of California, has been left 5 days earlier, and only temporarily, with them solely for a brief vacation period, with their express promise to return the child to the petitioner natural father, and where, when said aunt and uncle made said representation that they will return the visiting minor child from another state, they knew it to be false and at that time secretly planned to fail to return the minor child to the other state?

4. Whether natural parents living in California with a minor child, under an extant, viable California custody decree, having stipulated to a change of custody from the natural mother to the natural father, may invoke the Full Faith and Credit Clause of the Federal Constitution and the UCCJA to enforce the extant California Custody Decree and preclude a Montana State Court nullifying the California custody decree and awarding custody of their minor child to an aunt and uncle of that child where, at the time the aunt and uncle accepted the visiting minor child on their Montana Ranch, they secretly planned to withhold the child from the natural parents and attempt to gain custody in the Montana State Court system?
5. Whether the UCCJA shall be decreed nationally recognized law between all states whom have adopted it?
6. Whether, if a state adopts the UCCJA **during** the pendency of a child custody case, the provisions of the act must be applied retroactively to the pending child custody case?
7. Whether persons living in Montana obtain legally significant "physical custody" of a minor child merely in their home for a brief visit as that term is used in the UCCJA?
8. Whether, under the provisions of the UCCJA, a natural father living in California seeking to modify the custody from the natural father to the natural

mother of his minor child, born, living and always residing in California with either the natural father or natural mother **must give notice** of his intent to move in a California court to modify custody from the natural mother to himself, to an **aunt** and **uncle** of the minor child (the sister of the natural mother and and the sister's husband), living in Montana who, at that time, merely have had the child visiting in their home in Montana **for five days?**

9. Whether the District Court and the Supreme Court of Montana erroneously refused to grant Full Faith and Credit to the two child custody decrees of the Superior Court of the State of California for the County of Los Angeles initially awarding the custody of a California minor child always living in California, to the natural mother living in California, and then modifying said custody to the natural father living in California in July of 1975, on the grounds that the natural father and natural mother had abandoned the child, had abused and neglected the child, and had failed to "give notice" of the pending modification to the child's aunt and uncle who had the child as a guest at their Montana Ranch for **5 days** and who were secretly plotting to retain the child in Montana?
10. Whether the State of Montana violated the 4th & 14th Amendments to the U.S. Constitution in embracing the seizure of petitioner's minor child from petitioner on July 24, 1975 by Montana law enforcement and the withholding of the child in Montana for the following 4 years?

(d)

(a.) United States Constitution Full Faith & Credit Clause.

> **". . . Full Faith and Credit shall be given in each state to the public acts, records and judicial proceedings of every other state . . ."**

(b.) Uniform Child Custody Jurisdiction Act as Adopted in California and Montana

California Civil Code 5150 ff; M.C.A. 40-7-101 to 125

§ 5150. Purposes of act; construction of provisions M.C.A. 40-7-101

(1) The general purposes of this title are to:

(a) Avoid jurisdiction competition and conflict with courts of other states in matters of child custody which have in the past resulted in the shifting of children from state to state with harmful effects on their well-being.

(b) Promote cooperation with the courts of other states to the end that a custody decree is rendered in that state which can best decide the case in the interest of the child.

(c) Assure that litigation concerning the custody of a child take place ordinarily in the state with which the

child and his family have the closest connection and where significant evidence concerning his care, protection, training, and personal relationships is most readily available, and that courts of this state decline the exercise of jurisdiction when the child and his family have a closer connection with another state.

(d) Discourage continuing controversies over child custody in the interest of greater stability of home environment and of secure family relationships for the child.

(e) Deter abductions and other unilateral removals of children undertaken to obtain custody awards.

(f) Avoid relitigation of custody decisions of other states in this state insofar as feasible.

(g) Facilitate the enforcement of custody decrees of other states.

(h) Promote and expand the exchange of information and other forms of mutual assistance between the courts of this state and those of other states concerned with the same child.

(i) To make uniform the law of those states which enact it.

(2) This title shall be construed to promote the general purposes stated in this section.

§ 5151. Definitions M.C.A. 40-7-102

As used in this title:

(1) "Contestant" means a person, including a

parent, who claims a right to custody or visitation rights with respect to a child;

(2) "Custody determination" means a court decision and court orders and instructions providing for the custody of a child, including visitation rights; it does not include a decision relating to child support or any other monetary obligation of any person.

(3) "Custody proceeding" includes proceedings in which a custody determination is one of several issues, such as an action for dissolution of marriage, or legal separation, and includes child neglect and dependency proceedings;

(4) "Decree" or "custody decree" means a custody determination contained in a judicial decree or order made in a custody proceeding, and includes an initial decree and a modification decree.

(5) "Home state" means the state in which the child immediately preceding the time involved lived with his parents, a parent, or a person acting as parent, for at least six consecutive months, and in the case of a child less than six months old the state in which the child lived from birth with any of the persons mentioned. Periods of temporary absence of any of the named persons are counted as part of the six-month or other period.

(6) "Initial decree" means the first custody decree concerning a particular child.

(7) "Modification decree" means a custody decree

which modifies or replaces a prior decree, whether made by the court which rendered the prior decree or by another court.

(8) "Physical custody" means actual possession and control of a child.

(9) "Person acting as parent" means a person, other than a parent, who has physical custody of a child and who has either been awarded custody by the court or claims a right to custody.

(10) "State" means any state, territory, or possession of the United States, the Commonwealth of Puerto Rico, and the District of Columbia.

(Added by Stats. 1973, c. 693, p. 1252, § 1.)

§ 5152. Jurisdiction; grounds M.C.A. 40-7-103

(1) A court of this state which is competent to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree if the conditions as set forth in any of the following paragraphs are met:

(a) This state (i) is the home state of the child at the time of commencement of the proceeding, or (ii) had been the child's home state within six months before commencement of the proceeding and the child is absent from this state because of his removal or retention by a person claiming his custody or for other reasons, and a parent or person acting as parent continues to live in this state.

(b) It is in the best interest of the child that a court of this state assume jurisdiction because (i) the child and his parents, or the child and at least one contestant, have a significant connection with this state, and (ii) there is available in this state substantial evidence concerning the child's present or future care, protection, training, and personal relationships.

(c) The child is physically present in this state and (i) the child has been abandoned or (ii) it is necessary in an emergency to protect the child because he has been subjected to or threatened with mistreatment or abuse or is otherwise neglected or dependent.

(d) (i) It appears that no other state would have jurisdiction under prerequisites substantially in accordance with paragraphs (a), (b), (c), or another state has declined to exercise jurisdiction on the ground that this state is more appropriate forum to determine the custody of the child, and (ii) it is in the best interest of the child that this court assume jurisdiction.

(2) Except under paragraphs (c) and (d) of subdivision (1), physical presence in this state of the child, or of the child and one of the contestants, is not alone sufficient to confer jurisdiction on a court of this state to make a child custody determination.

(3) Physical presence of the child, while desirable, is not a prerequisite for jurisdiction to determine his custody.

(Added by Stats. 1973, c. 693, p. 1253, § 1.)

§ 5153. Notice and opportunity to be heard M.C.A. 40-7-104

Before making a decree under this title, reasonable notice and opportunity to be heard shall be given to the contestants, any parent whose parental rights have not been previously terminated, and any person who has physical custody of the child. If any of these persons is outside this state, notice and opportunity to be heard shall be given pursuant to Section 5154.

(Added by Stats. 1973, c. 693, p. 1253, § 1.)

§ 5154. Notice to persons outside this state; submission to jurisdiction M.C.A. 40-7-105

(1) Notice required for the exercise of jurisdiction over a person outside this state shall be given in a manner reasonably calculated to give actual notice, and may be made in any of the following ways:

(a) By personal delivery outside this state in the manner prescribed for service of process within this state.

(b) In the manner prescribed by the law of the place in which the service is made for service of process in that place in an action in any of its courts of general jurisdiction.

(c) By any form of mail addressed to the person to be served and requesting a receipt.

(d) As directed by the court (including publication, if other means of notification are ineffective).

(2) Notice under this section shall be served, mailed, delivered, or last published at least 10 days before any hearing in this state.

(3) Proof of service outside this state may be made by affidavit of the individual who made the service, or in the manner prescribed by the law of this state, the order pursuant to which the service is made, or the law of the place in which the service is made. If service is made by mail, proof may be a receipt signed by the addressee or other evidence of delivery to the addressee.

(4) Notice is not required if a person submits to the jurisdiction of the court.

(Added by Stats. 1973, c. 693, p. 1253, § 1.)

§ 5155. Simultaneous proceedings in other states M.C.A. 40-7-106

(1) A court of this state shall not exercise its jurisdiction under this title if at the time of filing the petition a proceeding concerning the custody of the child was pending in a court of another state exercising jurisdiction substantially in conformity with this title, unless the proceeding is stayed by the court of the other state because this state is a more appropriate forum or for other reasons.

(2) Before hearing the petition in a custody proceeding the court shall examine the pleadings and other information supplied by the parties under 5159 and shall consult the child custody registry established under 5165 concerning the pendency of proceedings

with respect to the child in other states. If the court has reason to believe that proceedings may be pending in another state it shall direct an inquiry to the state court administrator or other appropriate official of the other state.

(3) If the court is informed during the course of the proceeding that a proceeding concerning the custody of the child was pending in another state before the court assumed jurisdiction it shall stay the proceeding and communicate with the court in which the other proceeding is pending to the end that the issue may be litigated with Sections 5168 through 5171. If a court of this state has made a custody decree before being informed of a pending proceeding in a court of another state it shall immediately inform that court of the fact. If the court is informed that a proceeding was commenced in another state after it assumed jurisdiction it shall likewise inform the other court to the end that the issues may be litigated in the more appropriate forum.

(Added by Stats. 1973, c. 693, p. 1254, § 1.)

§ 5156. Inconvenient forum M.C.A. 40-7-107

(1) A court which has jurisdiction under this title to make an initial or modification decree may decline to exercise its jurisdiction any time before making a decree if it finds that it is an inconvenient forum to make a custody determination under the circumstances of the case and that a court of another state is a more appropriate forum.

(2) A finding of inconvenient forum may be made upon the court's own motion or upon motion of a party or a guardian ad litem or other representative of the child.

(3) In determining if it is an inconvenient forum, the court shall consider if it is in the interest of the child that another state assume jurisdiction. For this purpose it may take into account the following factors, among others:

(a) If another state is or recently was the child's home state.

(b) If another state has a closer connection with the child and his family or with the child and one or more of the contestants.

(c) If substantial evidence concerning the child's present or future care, protection, training, and personal relationships is more readily available in another state.

(d) If the parties have agreed on another forum which is no less appropriate.

(e) If the exercise of jurisdiction by a court of this state would contravene any of the purposes stated in Section 5150.

(4) Before determining whether to decline or retain jurisdiction the court may communicate with a court of another state and exchange information pertinent to the assumption of jurisdiction by either court with a view to assuring that jurisdiction will be exercised by the more appropriate court and that a forum will be available to the parties.

(5) If the court finds that it is an inconvenient forum and that a court of another state is a more appropriate forum, it may dismiss the proceedings, or it may stay the proceedings upon condition that a custody proceeding be promptly commenced in another named state or upon any other conditions which may be just and proper, including the condition that a moving party stipulate his consent and submission to the jurisdiction of the other forum.

(6) The court may decline to exercise its jurisdiction under this title if a custody determination is incidental to an action for divorce or another proceeding while retaining jurisdiction over the divorce or other proceeding.

(7) If it appears to the court that it is clearly an inappropriate forum it may require the party who commenced the proceedings to pay, in addition to the costs of the proceedings in this state, necessary travel and other expenses, including attorney's fees, incurred by other parties or their witnesses. Payment is to be made to the clerk of the court for remittance to the proper party.

(8) Upon dismissal or stay of proceedings under this section the court shall inform the court found to be the more appropriate forum of this fact, or if the court which would have jurisdiction in the other state is not certainly known, shall transmit the information to the court administrator or other appropriate official for forwarding to the appropriate court.

(9) Any communication received from another state informing this state of a finding of inconvenient forum because a court of this state is the more appropriate forum shall be filed in the custody registry of the appropriate court. Upon assuming jurisdiction the court of this state shall inform the original court of this fact.

(Added by Stats. 1973, c. 693, p. 1254, § 1.)

§ 5157. Jurisdiction declined by reason of conduct M.C.A. 40-7-108

(1) If the petitioner for an initial decree has wrongfully taken the child from another state or has engaged in similar reprehensible conduct the court may decline to exercise jurisdiction **for purpose of adjudication of custody** if this is just and proper under the circumstances.

(2) Unless required in the interest of the child, the court shall not exercise its jurisdiction to modify a custody decree of another state if the petitioner, without consent of the person entitled to custody has improperly removed the child from the physical custody of the person entitled to custody or has improperly retained the child after a visit or other temporary relinquishment of physical custody. If the petitioner has violated any other provision of a custody decree of another state the court may decline to exercise its jurisdiction if this is just and proper under the circumstances.

(3) Where the court declines to exercise jurisdiction upon petition for an initial custody decree pursuant to subdivision (1), the court shall notify the parent or other appropriate person and the prosecuting attorney of the appropriate jurisdiction in the other state. If a request to that effect is received from the other state, the court shall order the petitioner to appear with the child in a custody proceeding insituted in the other state in accordance with Section 5169. If no such request is made within a reasonable time after such notification, the court may entertain a petition to determine custody by the petitioner if it has jurisdiction pursuant to Section 5152.

(4) Where the court refuses to assume jurisdiction to modify the custody decree of another state pursuant to subdivision (2) or pursuant to Section 5163, the court **shall notify the person who has legal custody under the decree of the other state and the prosecuting attorney of the appropriate jurisdiction in the other state and may order the petitioner to return the child to the person who has legal custody. If it appears that the order will be ineffective and the legal custodian is ready to receive the child within a period of a few days, the court may place the child in a foster care home for such period, pending return of the child to the legal custodian. At the same time, the court shall advise the petitioner that any petition for modification of custody must be directed to the appropriate court of the other state which has continuing jurisdiction, or, in the event**

that the court declines jurisdiction, to a court in a state which has jurisdiction pursuant to Section 5152.

(5) In appropriate cases a court dismissing a petition under this section may charge the petitioner with necessary travel and other expenses, including attorney's fees * * * **and the cost of returning** the child **to another state.**

Boldface type indicates changes or additions by amendment.

§ 5158. Information under oath to be submitted to court M.C.A. 40-7-109

(1) Every party in a custody proceeding in his first pleading or in an affidavit attached to that pleading shall give information under oath as to the child's present address, the places where the child has lived within the last five years, and the names and present addresses of the persons with whom the child has lived during that period. In this pleading or affidavit every party shall further declare under oath as to each of the following whether:

(a) He has participated, as a party, witness, or in any other capacity, in any other litigation concerning the custody of the same child in this or any other state.

(b) He has information of any custody proceeding concerning the child pending in a court of this or any other state.

(c) He knows of any person not a party to the proceedings who has physical custody of the child or claims to have custody or visitation rights with respect to the child.

(2) If the declaration as to any of the above items is in the affirmative the declarant shall give additional information under oath as required by the court. The court may examine the parties under oath as to details of the information furnished and as to other matters pertinent to the court's jurisdiction and the disposition of the case.

(3) Each party has a continuing duty to inform the court of any custody proceeding concerning the child in this or any other state of which he obtained information during this proceeding.

(Added by Stats. 1973, c. 693, p. 1256, § 1.)

§ 5159. Additional parties M.C.A. 40-7-110

If the court learns from information fornished by the parties pursuant to Section 5158 or from other sources that a person not a party to the custody proceeding has physical custody of the child or claims to have custody or visitation rights with respect to the child, it shall order that person to be joined as a party and to be duly notified of the pendency of the proceeding and of his joinder as a party. If the person joined as a party is outside this state he shall be served with process or otherwise notified in accordance with Section 5154.

(Added by Stats. 1973, c. 693, p. 1256, § 1.)

§ 5160. Appearance of parties and child
M.C.A. 40-7-111

(1) The court may order any party to the proceeding who is in this state to appear personally before the court. If that party has physical custody of the child the court may order that he appear personally with the child. **If the party who is ordered to appear with the child cannot be served or fails to obey the order, or it appears the order will be ineffective, the court may issue a warrant of arrest against such party to secure his appearance with the child.**

(2) If a party to the proceeding whose presence is desired by the court is outside this state with or without the child the court may order that the notice given under Section 5154 include a statement directing that party to appear personally with or without the child and declaring that failure to appear may result in a decision adverse to that party.

(3) If a party to the proceeding who is outside this state is directed to appear under subdivision (2) or desires to appear personally before the court with or without the child, the court may require another party to pay to the clerk of the court travel and other necessary expenses of the party so appearing and of the child if this is just and proper under the circumstances.
(Added by Stats. 1973, c. 693, p. 1257, § 1. Amended by Stats. 1976, c. 1399, p. 6314, § 6.)

§ 5161. Binding force and res judicata effect of custody decree M.C.A. 40-7-112

A custody decree rendered by a court of this state which had jurisdiction under Section 5152 binds all parties who have been served in this state or notified in accordance with Section 5154 or who have submitted to the jurisdiction of the court, and who have been given an opportunity to be heard. As to these parties the custody decree is conclusive as to all issues of law and fact decided and as to the custody determination made unless and until that determination is modified pursuant to law, including the provisions of this title.
(Added by Stats. 1973, c. 693, p. 1257, § 1.)

§ 5162. Recognition of out-of-state custody decrees
M.C.A. 40-7-113

The courts of this state shall recognize and enforce an initial or modification decree of a court of another state which had assumed jurisdiction under statutory provisions substantially in accordance with this title or which was made under factual circumstances meeting the jurisdictional standards of the title, so long as this decree has not been modified in accordance with jurisdictional standards substantially similar to those of this title.

§ 5163. Modification of custody decree of another state M.C.A. 40-7-114

(1) If a court of another state has made a custody decree, a court of this state shall not modify that decree unless (a) it appears to the court of this state that the court which rendered the decree does not now have jurisdiction under jurisdictional prerequisites substantially in accordance with this title or has declined to assume jurisdiction to modify the decree and (b) the court of this state has jurisdiction.

(2) If a court of this state is authorized under subdivision (1) and Section 5157 to modify a custody decree of another state it shall give due consideration to the transcript of the record and other documents of all previous proceedings submitted to it in accordance with Section 5171.

(Added by Stats. 1973, c. 693, p. 1257, § 1.)

§ 5164. Filing and enforcement of custody decree of another state M.C.A. 40-7-115

(1) A certified copy of a custody decree of another state may be filed in the office of the clerk of any superior court of this state. The clerk shall treat the decree in the same manner as a custody decree of the superior court of this state. A custody decree so filed has the same effect and shall be enforced in like manner as a custody decree rendered by a court of this state.

(2) A person violating a custody decree of another state which makes it necessary to enforce the decree in this state may be required to pay necessary travel and other expenses, including attorneys' fees, incurred by the party entitled to the custody or his witnesses.

(Added by Stats. 1973, c. 693, p. 1257, § 1.)

§ 5165. Registry of out-of-state custody decrees and proceedings M.C.A. 40-7-116

The clerk of each superior court shall maintain a registry in which he shall enter all of the following:

(1) Certified copies of custody decrees of other states received for filing.

(2) Communications as to the pendency of custody proceedings in other states.

(3) Communications concerning a finding of inconvenient forum by a court of another state.

(4) Other communications or documents concerning custody proceedings in another state which may affect the jurisdiction of a court of this state or the disposition to be made by it in a custody proceeding.

(Added by Stats. 1973, c. 693, p. 1258, § 1.)

§ 5166. Certified copies of custody decree M.C.A. 40-7-117

The clerk of a superior court of this state, at the request of the court of another state or at the request of any person who is affected by or has a legitimate interest in a custody decree, shall certify and forward a copy of the decree to that court or person.

(Added by Stats. 1973, c. 693, p. 1258, § 1.)

§ 5167. Taking testimony in another state
M.C.A. 40-7-118

In addition to other procedural devices available to a party, any party to the proceeding or a guardian ad litem or other representative of the child may adduce testimony of witnesses, including parties and the child, by deposition or otherwise, in another state. The court on its own motion may direct that the testimony of a person be taken in another state and may prescribe the manner in which and the terms upon which the testimony shall be taken.
(Added by Stats. 1973, c. 693, p. 1258, § 1.)

§ 5168. Hearings and studies in another state; orders to appear M.C.A. 40-7-119

(1) A court of this state may request the appropriate court of another state to hold a hearing to adduce evidence, to order a party to produce or give evidence under other procedures of that state, or to have social studies made with respect to the custody of a child involved in proceedings pending in the court of this state; and to forward to the court of this state certified copies of the transcript of the record of the hearing, the evidence otherwise adduced, or any social studies prepared in compliance with the request. The cost of the services may be assessed against the parties or, if necessary, ordered paid by the state.

(2) A court of this state may request the appropriate court of another state to order a party to custody proceedings pending in the court of this state to appear in the proceedings, and if that party has physical custody of the child, to appear with the child. The request may state that travel and other necessary expenses of the party and of the child whose appearance is desired will be assessed against another party or will otherwise be paid.
(Added by Stats. 1973, c. 693, p. 1258, § 1.)

§ 5169. Assistance to courts of other states
M.C.A. 40-7-120

(1) Upon request of the court of another state the courts of this state which are competent to hear custody matters may order a person in this state to appear at a hearing to adduce evidence or to produce or give evidence under other procedures available in this state. A certified copy of the transcript of the record of the hearing or the evidence otherwise adduced shall be forwarded by the clerk of the court to the requesting court.

(2) A person within this state may voluntarily give his testimony or statement in this state for use in a custody proceeding outside this state.

(3) Upon request of the court of another state a competent court of this state may order a person in this state to appear alone or with the child in a custody proceeding in another state. The court may condition

compliance with the request upon assurance by the other state that travel and other necessary expenses will be advanced or reimbursed. **If the person who has physical custody of the child cannot be served or fails to obey the order, or it appears the order will be ineffective, the court may issue a warrant of arrest against such person to secure his appearance with the child in the other state.**
(Added by Stats. 1973, c. 693, p. 1258, § 1. Amended by Stats. 1976, c. 1399, p. 6314, § 7.)
Boldface indicates changes or additions by amendment

§ 5170. Preservation of records of custody proceedings; forwarding to another state M.C.A. 40-7-121

In any custody proceeding in this state the court shall preserve the pleadings, orders and decrees, any record that has been made of its hearings, social studies, and other pertinent documents until the child reaches 18 years of age. Upon appropriate request of the court of another state the court shall forward to the other court certified copies of any or all of such documents.
(Added by Stats. 1973, c. 693, p. 1259, § 1.)

§ 5171. Request for court records of another state M.C.A. 40-7-122

If a custody decree has been rendered in another state concerning a child involved in a custody proceeding pending in a court of this state, the court of

this state upon taking jurisdiction of the case shall request of the court of the other state a certified copy of the transcript of any court record and other documents mentioned in Section 5170.
(Added by Stats. 1973, c. 693, p. 1259, § 1.)

§ 5172. International application M.C.A. 40-7-123

The general policies of this title extend to the international area. The provisions of this title relating to the recognition and enforcement of custody decrees of other states apply to custody decrees and decrees involving legal institutions similar in nature to custody rendered by appropriate authorities of other nations if reasonable notice and opportunity to be heard were given to all affected persons.
(Added by Stats. 1973, c. 693, p. 1259, § 1.)

§ 5173. Calendar priority M.C.A. 40-7-124

Upon the request of a party to a custody proceeding which raises a question of existence or exercise of jurisdiction under this title the case shall be givn calendar priority and handled expeditiously.
(Added by Stats. 1973, c. 693, p. 1259, § 1.)

§ 5174. Short title M.C.A. 40-7-125

This title may be cited as the Uniform Child Custody Jurisdiction Act.
(Added by Stats. 1973, c. 693, p. 1259, § 1.)

(e)

STATEMENT OF THE CASE WITH FACTS MATERIAL TO THE CONSIDERATION OF THE QUESTIONS PRESENTED

1. **Petitioner HENRY SCHWARTZE is a resident of California. He is the natural father of his now ten-year-old minor daughter, Alexandra Schwartze.**

2. DIANE SCHWARTZE is a resident of California and is the natural mother of ten-year-old Alexandra.

3. **Henry and Diane** were married in Oregon and obtained a final dissolution of marriage in California on January 13, 1972. Alexandra was born on June 20, 1969 in California and has lived with either **Henry and Diane,** or **Diane,** from birth until June 15, 1975 at all times within California.

4. The January 13, 1972 California Divorce Decree awarded **Alexandra** to **Diane,** and based on a petition to modify child custody filed June 19, 1975 by **Henry** in California, the California Superior Court awarded custody of **Alexandra** to **Henry** on July 7, 1975. At all times herein relevant, **Henry, Diane** and **Alexandra** lived in California continuously from the child's birth in California on June 20, 1969 until June 15, 1975, when Alexandra, travelling by car with her paternal grandmother, arrived in Montana at the ranch home of **Diane's** sister and her husband **for a brief vacation,** with full expectation that she would be returned to her grandmother and thence to petitioner HENRY SCHWARTZE upon culmination of that brief vacation.

5. **John L. Holden** and **Linda Wenz Holden** are the current custodians of the minor daughter of petitioner **Henry Schwartze** and his wife, **Diane; Linda Wenz Holden** is the sister **Diane Wenz Schwartze** and **John L. Holden** is **Linda's** husband.

6. **John & Linda Holden** reside on a Montana Ranch with minor **Alexandra Schwartze,** they having been granted custody of the child by the District Court of Pondera County, Montana, sitting without a jury, although extant at the 1977 Montana custody award was a California custody decree changing custody from natural mother **Diane** to natural father **Henry,** the latter being petitioner herein, which in turn had modified the original custody order granting custody to Diane on January 13, 1972.

7. **Emil and Irene Wenz** are the parents of **Diane Schwartze** and **Linda Holden,** and the grand parents of the ten-yearold **Alexandra Schwartze.**

8. Following his marriage dissolution from **Diane** on January 13, 1972, petitioner, **Henry Schwartze,** sought to regain custody of his minor daughter **Alexandra** who had been awarded to **Diane.** Diane had been living common law with one **Bridges** in an atmosphere described, not unfairly, as not proper for the minor child; allegedly drugs were the periodic companions of **Diane's** existence with her boyfriend **Bridges** and the child was subjected to such an environment. Additionally, **Bridges** had allegedly made sexual advances towards **Alexandra.**

9. As the Montana Supreme Court has acknowledged, in its opinion of August 1, 1979, to the end of regaining

custody of his minor daughter, petitioner **Henry** consulted California attorney Jerome Kessler in November, 1973, in February 1974, on numerous occasions throughout 1974 and early 1975 with Kessler's paralegal office staff, and in early 1975 again with Kessler. (See pages A3 throughout A4, opinion of the Montana Supreme Court, Appendix to this Petition.)

10. Petitioner Henry was advised that lack of good proof of the undesirable scenario created for the child by natural mother **Diane** likely would preclude his successful recovery of custody of his minor daughter via a California Custody Modification.

11. The custody of **Alexandra** remaining with **Diane** prevailed until June of 1975 when, with permission of Diane, Henry's mother took the child with her on a vacation trip to Montana where, on June 15, 1975 they stopped at the ranch of the **Holdens.** Conversation between the Holdens and Henry's mother, concerning the child's unfavorable environment in California with Diane, produced the idea in the Holden's mind to attempt to achieve custody of **Alexandra** in themselves via the Montana courts. At this time they were made aware by Henry's mother that Henry had desired to regain custody of **Alexandra** from **Diane** but his lack of good proof of her environment had discouraged formal court procedures.

12. Virtually immediately, Linda Holden consulted with a cousin who was a Great Falls, Montana attorney, who in turn called Attorney Kessler in Los Angeles. **Kessler** and **Henry** thus learned of the Holden's desire to obtain

formal custody of **Alexandra** from **Diane,** and on June 19, 1975, **Henry** formally filed for modification of custody from Diane to himself. Eventually, Diane stipulated to this modification, and on July 7, 1975, **Henry** was awarded custody of **Alexandra.**

13. On June 20, 1975, one day following Henry's initiation of modification of custody procedures in California, the Holdens commenced their efforts in Montana, which were to lead to their successful wresting of custody of Alexandra from Henry, in defiance of the extant, viable California custody procedures and decrees continuously in existence since January of 1972.

14. On July 1, 1977, the State of Montana adopted as law the Uniform Child Custody Jurisdiction Act (UCCJA) which had been in effect in California for several years, and said UCCJA was in effect in Montana **prior** to the rendition of the Montana District Court which awarded petitioner's minor daughter Alexandra to John and Linda Holden.

15. At the time of the filing of the Montana custody suit by the Holdens, a viable, extant California decree was then in existence, and on June 19, 1977, said decree was sought modification by Petitioner Henry Schwartze. The modificationwas granted on July 7, 1977 and thus said original decree and/or modified decree were always viable and extant at all times in this litigation.

16. Under section 3 of the UCCJA (Civil Code 5152 in California, 40-7-103, Montana Code Annotated) the State of Montana and its District Courts **did not** have jurisdiction to attempt to modify or alter the custody of

petitioner's minor daughter who had lived every day of her years from June 20, 1969 to June 15, 1975 in California with one or both of her natural California parents under a California child custody decree because:

a. California, not Montana, was the home state of Alexandra at the time of commencement of the Montana proceeding on June 19, 1975 and had been the child's home state each day since her birth on June 20, 1969, until she left the State of California to travel with her grandmother to visit John and Linda Holden, her aunt and uncle, in Montana merely for a brief social visit.

b. Neither Alexandra nor either natural parent, nor the combination of the child **and** "at least one contestant" had a **significant connection** with the State of Montana for the child **never** lived in Montana, and there was nothing in Montana in the way of evidence concerning the child's present or future care, protection, training and personal relationships for the elementary reason the child had **never** had any contact with Montana as her home at any time in her six year life.

c. The child has not been abandoned, for her paternal grandmother then had physical temporary custody and her natural father, Henry Schwartze, was trying to get custody; in fact he had consulted at least two attorneys in attempting to do so; the child was then not being mistreated, threatened, or abused, by her grandmother or her natural father.

(d) California **had** continuing jurisdiction and **never declined** to exercise jurisdiction of the child, and

no interest of the child dictated that persons, courts, or attorneys in Montana interlope into the child's life. The child, her parents, her paternal grandparents, her records, her friends, her present and future care, protections, training and personal relationships all repose in California.

16. Within the meaning of Section 4, UCCJA (California C.C. 5153 & MCA 40-7-104) the persons in Montana that were visited, John & Linda Holden, did not acquire **"Physical custody"** of the child so as to require the Holdens to be served and named as litigants to modify a California decree in litigation between the natural parents, and the Holdens were **not** served under the California modification petition dated June 19, 1975, a mere four days after Alexandra commenced her visit on the Holden Ranch in Montana.

17. Under Section 6, UCCJA (California C.C. 5155, MCA 40-7-106) the Courts of Montana must abstain from exercising jurisdiction because of the viable, extant California decree of January 13, 1972, which was modified on July 7, 1975.

18. The District Court in Montana did not have jurisdiction and failed to abstain under the UCCJA and Full-Faith and Credit Clause of Article IV, Section I, U.S. Constitution, from attempting to adjuicate the child custody rights of the petitioner and his six-year-old daughter awarding the child to the natural father.

19. The Montana Court had no jurisdiction and defied the Full-Faith and Credit Clause requirements that Montana respect and defer to the extant California

Judgment of Child Custody and the only permissible forum for the Holden's to attempt to alter petitioner's custody of his natural child was California.

20. Petitioner seeks certiorari to have:

(a) This Court interpret whether the Full Faith and Credit Clause of Article IV, Section I, U.S. Constitution, applies to interstate child custody disputes, **and**

(b) This Court rule whether Montana and its Supreme Court must accord Full Faith and Credit to the extant, valid California Custody decree of January 13, 1972 as modified July 7, 1975.

(f)

ARGUMENT

THIS HONORABLE COURT SHOULD GRANT CERTIORARI TO RESOLVE THE UNANSWERED NATIONAL QUESTION WHETHER THE FULL FAITH AND CREDIT CLAUSE OF THE UNITED STATES CONSTITUTION SHALL BE APPLICABLE TO STATE CHILD CUSTODY DECREES BETWEEN STATES WHERE BEFORE FINAL ADJUDICATION, BOTH HAVE ADOPTED THE UNIFORM CHILD CUSTODY JURISDICTION ACT. (UCCJA)

In this petition for writ of certiorari, the petitioner invites interpretation of the Full Faith and Credit Clause to state child custody decrees, a case of first impression before this Honorable Court.

In the case at bar one of the fundamental rights of natural parenthood is placed at issue against the Full Faith and Credit Clause of the United States Constitution—the keeping and rearing of a child by at least one of the natural parents, from birth to emancipation, in spite of some rocky perturbations along the marital development path which led to initial dissolution of the marriage with award of the minor child to the natural mother, and then later followed by a switch of custody to the natural father. All matters were and are goverened by a valid extant California custody decree.

Significantly, the birth and initial entire 6 years of the life of the minor daughter of petitioner, **Alexandra Schwartze,** were lived either with her natural parents, or her natural mother, in **California** under a **California** custody decree stemming from a **California** divorce. On January 13, 1972 petitioner **Henry's** marriage to **Diane** was dissolved by the Superior Court of **Los Angeles County, California,** who awarded then 2-1/2 year old **Alexandra** to her natural mother **Diane Schwartze.** Subsequently, **Diane's** mode of living and the atmosphere **Diane** provided for **Alexandra** fell short of the minimally accepted levels. Allegedly an atmosphere of companions using drugs and making sexual advances toward the **minor** were the hallmark of **Alexandra's** January 1972—June 1975 life with her natural mother **Diane.** While cognizant of these highly undesirable surroundings, petitioner's efforts to rectify it met with discouraging prognostications by California attorneys consulted by petitioner, who

essentially told **Henry** that he could only alter the custody of the child from **Diane** to himself if he could provide an eyewitness to the sexual and drug abuse scenario provided by **Diane** and her companions.

In early June of 1975, petitioner's mother, with permission, took the child on an extended vacation over the Western United States and Canada arriving for a brief visit at the Montana Ranch of an aunt and uncle of the child on June 15, 1975.

Fannie Boller, the paternal grandmother, shared her concern over the child's future with Diane with the aunt and uncle, **Linda and John Holden,** and they became understandingly appalled at the conditions created for the child by **Diane,** who was the sister of **Linda Holden.** Virtually at once, the Holdens sought the advice of a cousin of Linda's, one **Warren Wenz,** a Great Falls, Montana attorney. **Wenz** called a Los Angeles attorney, **Jerome Kessler,** known to be consulting petitioner **Henry Schwartze** in his effort to secure custody of his natural daughter from his ex-wife, **Diane.** In fact, petitioner's mother, **Fannie Boller,** the paternal grandmother, clearly advised Montana attorney **Wenz** that petitioner **Henry** was most desirous of regaining his daughters custody. In conversations with attorney **Jerome Kessler, petitioner's Los Angeles attorney, Wenz** revealed that he had been commissioned to initiate proceedings in a Montana state court to wrest custody of the minor child from **Diane** and ostensibly keep her in Montana. It was, of course understood at that time by petitioner's mother **Fannie**

Boller, that the child was being left with the Holdens for a brief vacation period at the Montana Ranch and would be returned to Mrs. Boller and eventually to petitioner at the end of the short period. See opinion pages A7.

At this time, June 15-19, 1975, **Diane** had official custody of **Alexandra** pursuant to an extant, viable child custody decree of January 13, 1972 of the Los Angeles County Superior Court. The child had then lived continuously in Los Angeles for 6 years and all of her records, contacts, friends, and both natural parents resided in Los Angeles. California was, then, Alexandra's **home state,** where she and both natural parents lived, worked, and had all contacts for all of her 6 years of life.

John and Linda Holden, the latter being **Diane's** sister, became interlopers into the lives of petitioner and his daughter in spite of the extant, viable California child custody decree, and in spite of no invitation for them to do so, they initiated child custody proceedings on June 20, 1975 in Montana, the 6th birthday anniversary of Alexandra. Petitioner learned of their attempt and on June 19, 1975 initiated contested California proceedings to change Alexandra's custody to himself; eventually on July 7, 1975, the custody was changed by stipulation from **Diane** to **Henry.** Quite understandably, **Henry** and **Diane,** the natural parents, did **not** bring the **Holdens into the June 19, 1975 California litigation for their child was a mere visiting guest** of the Holdens at their Montana Ranch, and at the time **Henry** commenced his proceedings to modify the **extant, viable** California decree of

January 13, 1972, Alexandra had been a visiting guest of the Holdens for a mere **4 or 5 days,** a time period hardly commensurate with their having become bestowed with legal "physical custody" of Alexandra.

Then followed a Montana custody suit by the Holdens against **Diane** and her then boy friend, one Bridges, upon whom service was obtained, and against petitioner Henry, upon whom service was never obtained via the Montana state courts. Nonetheless, Henry appeared by counsel to challange jurisdiction, and on July 24, 1975, **Henry,** his mother, **Fannie Boller,** and a male friend of Henry arrived at the Holden's Montana Ranch to enable Henry to retrieve his 6 year old natural daughter from the clutches of the Holdens. Henry, who took the girl, was only briefly successful; before nightfall, the Holdens had the attention of the local County Sheriff focused on Henry, and Henry's natural child was retaken by force; **Henry,** his **mother,** and his **friend** were jailed for the night in Montana. No charges were pressed against Henry for his efforts to reclaim his natural daughter under the viable, extant California decree and the Holdens maintained possession of Alexandra from that time forward until the local Montana District Court, setting without a jury, defied the California decrees of January 13, 1972 as modified by July 7, 1975 and awarded petitioner's natural minor child to his ex-sister-in-law and her husband living some 1,000 miles away from California in upstate Montana.

The Montana Supreme Court affirmed this trial level decision in a strained analysis allegedly justified by, inter alia:

(a) that while Montana had enacted the UCCJA on July 1, 1977, at a time that the Montana decree had not yet materialized, the UCCJA need **not** be retroactively applied in Montana in order to require Montana to abstain from interloping into the extant, viable California decree.

(b) that, however, the provisions of the UCCJA should be applied at the actual trial but by then the delays of the Montana court process had kept Alexandra in the hands of the **Holdens** for some 2 years at trial time and some 4 years at the August 1, 1979 appeal resolution date, and thus Montana had obliterated California as the child's "home state", and her ties to California had become dissolved and thus Montana could adjudicate **de novo** the custody of **Alexandra;** in short, the Holdens had taken advantage of their own state's judicial delays, and had successfully absconded with petitioner's natural daughter with embrace of the court system of Montana.

The California Court of Appeals, in a very recent case interpreting the interstate consequences of the UCCJA on the "reasoning" that the interloping state could gain jurisdiction via its forces keeping the child forcibly within its borders away from its home state, said in **Palm v. Superior Court.** _____ Cal. App 3rd _____, _____, _____ Cal. Rptr _____, _____:

> "Here, substantial evidence, uncontradicted fact support the trial courts conclusion that California not only is the child's home state but that the significant relationships are here **and the best interest**

of the child can be best investigated in California. From the record before the court . . . North Dakota had only **minimal access to facts concerning the child.** The Uniform Act **favors the state having the maximum contacts** for determining the child's best interest. **Much of the contact established by the child in North Dakota has resulted from the father's refusal to surrender the child at the end of visitation periods . . .**"

Thus, quite clearly, Montana cannot justify itself as having "jurisdiction" in 1977 by virtue of its forces holding the child in Montana. Plainly, when it took jurisdiction on June 20, 1977, the child had been within Montana for a mere 4 or 5 days as a visitor, had lived her entire exact 6 years in California with either one or both of her natural parents, her contacts were totally within California and not at all in Montana, **and** a viable, extant custody decree out of the California courts governed her relationship with her natural parents. Plainly, Montana on June 20, 1975 had **no** relationship to this child recognized by the UCCJA and its position could not improve by use of its forces to keep the child within Montana.

(c) that Henry would not be successfully heard, at appeal, on his contention that Montana had failed to give Full Faith and Credit to the extant California custody decree for the Superior Court of Los Angeles County and Henry himself failed to honor the mandate of the UCCJA that required **John and Linda Holden** to be made parties to the California June 19, 1975 **petition to modify** since

they supposedly had **"physical custody"** of Alexandra due to her then being their house guest for a mere 4-5 days!!!

NOTA BENE: this interpretation of "physical custody" of the Montana High Court insults the intelligence when one notes that the Holdens secretly planned to retain **Alexandra** as their own child and property as early as circa June 15 or 16, 1975, that she had been at the Holden's for a brief 4-5 days and the Holdens had caused the arrest and jailing in Montana on July 24, 1975 of **Henry, Henry's mother Fannie Boller** and **Henry's friend** when they came to Montana with the alleged audacity and allegedly misplaced intrepidity to reclaim Henry's own natural daughter a mere 5 weeks after Holden and his wife had reneged on returning the child following acquiring her presence on June 15, 1975 at their ranch as a mere visiting guest. Thus all the inter-state bickering that the UCCJA was designed to circumvent and abrogate surfaces in this case: the tendency of the local court to give favor to its local litigants; the ignoring of the Full-Faith and Credit Clause of the Federal Constitution and delay of litigation for such a sufficiently long period that the Holdens and Montana had self-boot-strapped Alexandra to a "home state" status in Montana; the embrace by a high court of kidnapping by the local Montana sheriff and jailing of the California natural father for attempting to regain possession of his natural minor of the then age of 6 years; the embrace of the obviation of the Holdens going to California to successfully litigate, if they had standing at all, their asserted right to Alexandra.

(d) that ". . . the facts of this case indicate that the child had been left in Montana because in May and June of 1975 she was not wanted by either of her parents . . ." (Page A19 opinion), although we fail to see where this conclusion comes from, for surely **Fannie Boller** left the child as a mere guest for a few days fully expecting the Holdens to return her at the end of the period, for Fannie had detailed the child's relationship in a letter to Montana Attorney **Wenz** ". . . closing with a plea that someone would help her son, the father, gain custody of the child . . . and "The grandmother testified **that she understood the child would be returned to her in Oregon after she returned home from Canada . . .**" (Page A7, opinion, Montana Supreme Court); further, and importantly, petitioner on June 19, 1975, by his petition to gain custody for himself and his successful result on July 7, 1975, and his trip to Montana on July 24, 1975 surely manifested no intent to **abandon Alexandra.** Surely petitioner ". . . had **not permitted** her to be left with his former wife's relatives 1,000 miles away . . ." as the Montana Supreme Court erroneously states at page A19.

Similarly, the Montana high court errs at A19-20 when it concludes that the Montana District Court could assume jurisdiction of Alexandra because the child ". . . had been abandoned by **both** of her natural parents . . ."; likewise, while it might be true that **Diane** had abused the child during her own erstwhile custody of Alexandra, no concomitant evidence indicated that petitioner **Henry** was, or had been at that level of behavior. (See 40-4-211 (1) (c) MCA).

In short before this Honorable Court is placed for decision the first nationwide interpretation of the Uniform Child Custody Jurisdiction Act measured by the Full Faith and Credit Clause of the United States Constitution.

Certiorari must and should be granted to interpret the UCCJA and its viability under the Full Faith and Credit Clause of the Federal Constitution.

The decision of the Supreme Court of Montana is bottomed on several misconceptions:

(1.) The UCCJA requires the State of Montana to abstain from adjudicating a child custody dispute de novo where there is extant and viable a California child custody decree; here the original decree was entered January 13, 1972, and modified on July 7,1979, and the Montana court was aware of these rulings; therefore, it must abstain.

(2.) The UCCJA requires the State of Montana to recognize the doctrine of **forum non conveniens** where California has been the "home state" of the child for the 6 consecutive years, and only years, of her entire life, where both her natural parents reside, where all of her records, contacts and friends are located and where she has left **only** for a brief vacation with a paternal Grandmother who has herself lived in California and is taking the child on a vacation.

The State of Montana can not and should not be able to circumvent the forum non conveniens doctrine by such acts as directing a local sheriff to forcibly kidnap the minor when her natural father sought to retrieve her on July 24, 1975, by causing his arrest and jailing and then delaying

adjudication of the case in Montana until 1977, all of which fostered a Montana Supreme Court contention that the child had now in 1977, become a "home state" Montana domiciliary. In short she had so become, if true, solely because the forces of Montana had forcibly kept her from petitioner, her natural father. Thus, the State of Montana should not be allowed to assert that it has become the logical forum solely by virtue of using all its forces to keep the minor in Montana away from petitioner, her natural father, for a period of **2 years** at trial and **4 years** at appeal adjudication. This "reasoning" defies the principles of unclean hands, and contravenes the very foundation of what the UCCJA was designed to abrogate.

(3.) The State of Montana and its Supreme Court misconceives the UCCJA requirement that any party having **"physical custody"** of the child must be served and made a party to the California modification petition filed June 19, 1975, for one can not legally secure **"physical custody"** of a minor child for the purposes of the UCCJA, who is merely visiting as a house guest, and who had been on the premises a mere 4 or 5 days. Montana, via its Supreme Court opinion, erroneously rules that "Full Faith and Credit " need not be given the July 7, 1975 modification decree awarding petitioner Henry Schwartze the custody of his natural daughter because Henry failed to bring as "litigants", in California, John and Linda Holden who had Alexandra as a house guest for 4 or 5 days. See A24—A26 opinion.

The California Court of Appeals in Palm v. Superior Court, _____ Cal App. 3rd _____, _____, _____ Cal. Rptr _____, _____, cited with approval Pro-

fessor Brigitte Bodenheimer's work on child custody on this issue:

"The child's temporary presence in a state on a visit does not confer custody jurisdiction under the Act . . . It is generally acknowledged that the unfortunate tendency of courts to favor the local petitioner still persists . . . Thus the child would be exposed to the risk of having custody transferred to the visited parent . . ."

(Brigitte M. Bodenheimer, Progress Under the Uniform Child Custody Jurisdiction Act and Remaining Problems; Punitive Decree, Joint Custody, and Excessive Modifications, 65 Cal. Law Review 978, 995-997)

Where a natural parent living in an another state having his child with him on a mere visit can not thereby confer "physical custody" jurisdiction on the state that the mere visit occurs in, it follows with all the more force that **relatives** in the position of **aunt** and **uncle** cannot acquire legal "physical custody" of Alexandra based on her mere 5 day visit to their Montana Ranch.

(4.) The Montana Supreme Court erred in failing to require full retroactivity, in Montana, of the UCCJA, to the instant proceeding which had not been yet adjudicated on July 1, 1977, the date the UCCJA became law in Montana. It erroneously labels theUCCJA as "procedural" when in fact its procedural and substantive aspects are the critical bulwark of the Act in its efforts to reduce interstate child custody squabbles, and both must

be given retrospective application to a case then not adjudicated. It must be remembered that Montana and its forces engaged in child snatching of **Alexandra** from her natural father, petitioner herein, as early as July 24, 1975, and kept her by force within the State of Montana for over 2 years until trial.

(5.) The Montana Supreme Court errs, misstates and falsifies the true facts as it argues laboriously, and in a strained manner, that Montana had local jurisdiction of **Alexandra** on June 19, 1975. While setting forth the "4 separate bases of jurisdiction" at A18-19 at least **one** of which must exist on June 19, 1975, in order to confer jurisdiction in Montana, it is plain that **none** of them existed on June 19, 1975.

FIRSTLY, Montana, on June 20, 1975, was **not** the child's **home state** and had **not** been the child's **home state** for 6 months prior to the commencement of the Montana custody prodeedings, 40-4-211 MCA; 40-7-103 MCA; on June 19, 1975, she had plainly lived in California for 6 years immediately preceeding, and had been a house guest in Montana for a mere 5 days!!!

Secondly, neither the child **nor** its natural parents had "... a significant connection with Montana on June 19, 1975, and **no** substantial evidence concerning the child's care, protection, training and personal relationships . . ." reposed in Montana on June 19, 1975; all of the foregoing were firmly situated in California.

Thirdly, the child was present in Montana as a mere

house guest and then only for 4-5 days; she had been brought by her paternal grandmother, **Fannie Boller;** who was then not "abandoning" her, and from whom she did **not** need "emergency protection" because Mrs. Boller was mistreating her, neglecting or abusing her or anything remotely similar. While **Diane,** her natural mother, may well be said to have abandoned the child, **Fannie Boller** and her natural father, petitioner herein, wanted her custody. Petitioner had remarried and was fully able to assume custody, as he was so granted on July 7, 1975; and

Fourthly, the state of California **had** continuing jurisdiction, and seemingly no great Montana interest was then at stake by the Holden's interloping into the affairs of petitioner, his mother, and his child while the child was on vacation with the paternal grandmother.

Thus pages A14 through A20, opinion of the Montana Supreme Court, reflect intellectual dishonesty, distortion and fabrication of facts, and appear to be pure sophistry.

The entire "analysis" of the Montana Supreme Court found at pages A14 through A20 flies in the face of all that the UCCJA seeks to circumvent. That mere relatives of an ex-wife can leap-frog over the rights of the natural parent, petitioner herein, to custody of his own child, makes the position taken by the Montana Supreme Court ridiculous and ludicrous. The Supreme Court of Montana acknowledges at A16.

". . . .it is nonetheless prudent to inquire whether the facts **which existed on June 19,1975** would

have permitted the District Court to take jurisdiction of the case had the Act (UCCJA) been effective on that date. If the facts **as of that date** would not have justified the assumption of jurisdiction, the courts ultimate custody order is **not** entitled to recognition and enforcement by other UCCJA states under Section 13 of the Act, section 40-7-114 MCA. In the present case, facts meeting the jurisdictional standards of the Act **did exist** on the date the action was filed . . ."

As we have enumerated above, however, facts surely did **not** exist which would vest jurisdiction in Montana, for, in summary:

(1.) Montana was **not** Alexandra's home state nor had it been her home state within 6 months prior to the date of June 19 or June 20, 1975.

(2.) Neither the child **nor Diane** or **Henry,** her natural parents had **any** connection of significance with Montana, and no substantial evidence reposed in Montana concerning Alexandra's care, protection, training, and personal relationships. Her sole contact with Montana was her then 5 day tenure as a mere visiting guest of the Holdens.

(3.) Alexandra had **not** been abandoned, for her grandmother, Fannie Boller, then was responsible for her and fully expected her to be returned by the Holdens; she was not then anymore in the posture of mistreatment, abuse, neglect or dependency upon Diane and **Henry** had initiated proceedings to gain custody;

(4.) California clearly remained in jurisdiction by virtue of its January 13, 1972 decree and did not refuse jurisdiction. Indeed, California was shown most receptive to continue jurisdiction by its acceptance of the modification petition and grant of that petition on July 7, 1975.

A recent California appellate decision recognizing **North Dakota** as having continued jurisdiction over its decree of divorce awarded in the marriage of Palm (See Palm v. Superior Court, _____ Cal. App. 3rd _____, _____ Cal. Rptr _____) (Oct. 1, 1979) cites with approval the well recognized child custody expert Professor Bodenheimer; the quote interprets Section 14 of the Act, i.e. California Civil Code Sect. 5163 and M.C.A. 40-7-114:

"Moreover, where a custody decree has been made, section 5163, subdivision (1), become relevant. That provision reads:

"(1) If a court of another state has made a custody decree, a court of this state shall not modify that decree unless (a) it appears to the court of the state that the court which rendered the decree does not now have jurisdiction under jurisdictional prerequisites substantially in accordance with this title or has declined to assume jurisdiction to modify the decree and (b) the court of this state has jurisdiction."

Professor Bodenheimer, the reporter for the committee which prepared the Uniform Law, interprets the effect of section 5163 (§ 14 of the Act) as follows:

"A typical example is the case of the couple who are divorced in state A, their matrimonial home state, and whose children are awarded to the wife, subject to visitation rights of the husband. Wife and children move to state B, with or without permission of the court to remove the children. State A has continuing jurisdiction and the courts in state B may not hear the wife's petition to make her the sole custodian, eliminate visitation rights, or make any other modification of the decree, even though state B has in the meantime become the 'home state' under section 3 (Civ. Code, § 5151 (5)). The jurisdiction of state A continues and is exclusive as long as the husband lives in state A unless he loses contact with the children, for example, by not using his visitation privileges for three years." (Bodenheimer, **Uniform Child Custody Jurisdiction Act** (1969) 22 Vand. L. Rev. 1207, 1237; see similar examples in Commissioner's Notes to § 3, Uniform Child Custody Jurisdiction Act.)

Substitute North Dakota for "A" and California for "B' and you have the present fact situation. All petitions for modification are to be addressed to the state which rendered the original decree if that state has jurisdiction under the standards of the Act **(In re Marriage of Schwander, 79 Cal.App. 3rd 1013, 1019)."**

In concluding that a Writof Prohibition should issue to halt a California Superior Court from encroaching where North Dakota was then in jurisdiction, the California Appellate Court further stated in Palm v. Superior Court, _____ Cal. App. 3rd _____, _____, _____ Cal. Rptr _____, _____:

We hold under the facts of this case the California court was required to stay its proceedings under Civil Code section 5155, subdivision (1), because a custody proceeding was already pending in North Dakota and the relief sought amounted to a modification of the North Dakota decree when that state still had jurisdiction and had assumed it (§ 5163, subd. (1) (a)). North Dakota has continuing jurisdiction under the Act and the right to exercise it. There is nothing in the record to show North Dakota was not acting substantially in conformity with this Act.

Interestingly enough, because of different facts in the case at bar, **both** the majority and dissenting opinions in **Palm v. Superior Court,** _____ Cal. App. 3rd _____, _____ Cal Rptr _____ shed light upon the UCCJA and favor the position taken by petitioner, viz:

(a) that California was the only state that could logically entertain modification petitions concerning Alexandra's custody on June 19, 1975;

(b) Montana can not obtain 1977 jurisdiction because its forces have maintained the child as a virtual kidnapped exile against efforts of petitioner to retrieve his natural daughter from Montana;

(c) a mere social visit to a foreign state for 5 days does not confer legal "physical custody" of a minor

child, under the UCCJA, upon the parties detaining the child so that the natural parent litigants still living in the home state need make the foreign state persons illegally holding the child parties to the home state modification petition;

(d) the "home state" is the proper place of modification petitions where both natural parents, the child, the records, the contacts, the information about the child's protection, training, schooling, and influences all repose, and the foreign state has none of the above save some relatives who seek to maintain a modification. The UCCJA would not, of course, preclude relatives from out of the "home state" from **coming to** the "home state" to initiate a petition, but they surely can not file such a petition in the foreign state on a mere 5 day visit of the child to the foreign state.

We conclude that serious Federal Constitutional issues are presented in this case of First Impression of application of Article 4, Section 1 of the Federal Constitution to Interstate child custody squabbles under the Uniform Child Custody Jurisdiction Act.

We contend that a shocking result has been reached by the Montana District Court, and the shocking result has been embraced by the Supreme Court of Montana.

We find it difficult to believe that any state can gain jurisdiction over a child by having that child as a **mere visitor** within its borders for 5 days!! Professor Bodenheimer, one of the acknowledged experts on UCCJA

states that such a visit does not confer "physical custody" within the meaning of the Act upon the parties whom have the child as guest including the **parent** living in the visited state who might try to so assert; ipso facto, it can not confer it upon an **aunt and an uncle,** the **sister** of an estranged wife who does not want custody of her own child and who has formally stipulated custody alteration to the natural father, who is the petitioner before this Honorable Court.

We contend that under the UCCJA, or any other aegis, the State of Montana did not, and could not obtain jurisdiction to litigate custody of petitioner Henry Schwartze's natural daughter, Alexandra on June 20, 1975. Moreover that state could not gain jurisdiction by evolution over the next 2 years until final trial level adjudication in 1977 because the forces of Montana were used to forcibly keep the child within its border for that 2 year period. The UCCJA **denies** jurisdiction and relief to such parties under the doctrine of **unclean hands.** See Section 8 (2) UCCJA, 40-7-108(2) MCA, section 5157(2), Civil Code of California.

We contend that **California** was the sole forum under the facts of this case, where any effort to modify the extant California decrees of January 13, 1972 and July 7, 1975 could be undertaken. The child and both natural parents then lived, and always lived in California and nowhere else; the child's paternal grandmother, who cared for her off and on, on weekends lived there. The records and contacts of the child were in California. The state of California had **not** refused jurisdiction, and on June 19, 1975, one day

before the Montana interlopers filed a Montana custody petition, California clearly manifested its continuing interest in jurisdiction of the child rendering modification judgment on July 7, 1975.

The state of Montana and its inhabitants had **zero** contact with this California child save the act of unclean hands, or outright kidnapping of the child on July 24, 1975 from petitioner, and subsequent illegal withholding of the child within its borders. To allow the Montana Supreme Court to "reason" that the child had acquired Montana as its "home state" by virtue of illegal maneuvers of that state insults the intelligence and is an intellectual non-sequitur of the highest degree.

We pray that this Honorable Court will grant this petition for certiorari to the Supreme Court of Montana to resolve this case of first impression on the applicability of Article IV ,Section 1, the Full Faith and Credit Clause of the United States Constitution. to Interstate child custody matters under the UCCJA, adopted in both Montana and California.

Virtually hand in glove with Article IV, Section I is the 4th and 14th Amendment issue of the **seizure** of petitioner's minor child by Montana law enforcement on July 24, 1975 without arrest or search warrant. We contend such illegal seizure should have as its sanction the foreclosure of relief to Montana litigants in Montana courts under the UCCJA.

We pray that certiorari to the Supreme Court of Montana will be granted.

CONCLUSIONS

In this case of first impression, the national scope issue is whether the Full Faith and Credit Clause of the U.S. Constitution shall be applied to Interstate child custody decrees. The State of Montana and the State of California both had adopted the Uniform Child Custody Jurisdiction Act in 1977 at the time the Montana District Court purported to take custody of petitioner's natural child and award her to Montana residents.

We perceive that the national scope of the UCCJA warrants this court's putting the final nation-wide imprimatur on the interpretation of the Act by the Supreme Court of Montana.

We pray that certiorari be granted.

DATED: October 26, 1979, at Santa Ana and Los Angeles, California.

Respectfully submitted,

ROGER S. HANSON
and
JEROME KESSLER
Members of the Bar, U.S. Supreme Court,

Attorneys for Petitioners,
Henry Schwartze,
et. al.

APPENDIX "A"

No. 14228

IN THE SUPREME COURT OF THE STATE OF MONTANA

1979

EMIL WENZ, et al.,

Plaintiffs and Respondents

vs.

DIANE SCHWARTZE, et al.,

Defendants and Appellants

Appeal from: District Court of the Ninth Judicial District, Honorable Joel G. Roth, Judge presiding.

Counsel of Record:

For Appellants:

Smith, Emmons, Baillie & Walsh, Great Falls, Montana, James R. Walsh argued, Great Falls, Montana

For Respondents:

Marra, Wenz, Iwen and Johnson, Great Falls, Montana, Joseph Marra argued and Warren Wenz argued, Great Falls, Montana

Carroll Blend argued, Great Falls, Montana

Submitted: May 4, 1979

Decided August 1, 1979

Filed: August 1, 1979

s/Thomas J. Kearney, Clerk

Mr. Justice Gene B. Daly delivered the Opinion of the Court.

The District Court of Pondera County terminated the parental rights of a father and mother, both residents of California, and granted custody of their daughter to her aunt and uncle, residents of Montana. The father appeals.

The subject of this appeal is a minor child who was born in California in 1969. Her parents separated some eighteen months after her birth and obtained a final dissolution of marriage on January 13, 1972. The Los Angeles County Superior Court, in an uncontested proceeding, granted custody to the mother and allowed reasonable visitation to the father. It also ordered the father to pay weekly child support of $25 and to maintain medical and life insurance policies for his daughter's benefit.

Prior to the dissolution, the mother had separated from the father and had begun living with another man, alternatively known as Bridges, Martin, or Leonard. While the parents' living condition prior to their separation had not been ideal, the conditions under which the mother and child lived grew steadily worse in the company of Bridges. The mother, child, and Bridges lived in a variety of houses, and finally in a run-down apartment with little furniture, little food, and much questionable company.

As time went on and conditions worsened for the mother and child, the child's paternal grandmother, who lived in the area, became concerned for the child's welfare. She made frequent visits to the mother's apartment and often kept the child on weekends. In late 1973 after her mother and Bridges had moved into an apartment building in Venice, California, the child began relating information which caused her grandmother considerable concern. She described in particular that her mother and Bridges had received, on occasion, hypodermic injections from some unknown man, and that she was unable to awaken her mother after she had received those injections. She also told how she had been repeatedly subjected to sexual abuse by Bridges. The grandmother testified that the child's complaints of abuse were ongoing and confirmed that the child had visible physical indications of abuse.

The grandmother shared this information with the child's father and his new wife. When questioned by the father, the child first refused to answer but later gave an affirmative response. She also responded positively to the father's new wife. The father next questioned the child's mother, who denied any such activities. His testimony indicates that he cannot remember whether he ever confronted Bridges with this information.

In November 1973 the father spoke to Jerome Kessler, an attorney in Los Angeles, about a change of custody. According to Kessler, the father said that his former wife "was a hippie who wanted to go on

welfare'' and the father ''expressed an interest at some point obtaining custody of his daughter.'' Kessler told the father at that time that he doubted whether the father had ample grounds to obtain a modification of the decree.

The father again consulted Kessler in February 1974, and, according to Kessler, told him of at least one of the alleged incidents of abuse. Kessler testified that he informed the father that some form of proof would be necessary, and that a lawsuit to change custody would be difficult to maintain in the absence of an eyewitness to the mistreatment of the child.

A deposition by Linn Davis, a paralegal in Kessler's office, indicates that the father spoke with her on numerous occasions regarding a change of custody. However, her testimony indicates that the father's reasons for desiring custody remained general until the early part of 1975. ''At first it was just an expression of desire for the child.'' In January or February, according to Davis, the father complained that his former wife was a ''hippie, an irresponsible woman who did not seem to care about the suitability of the environment of the child.'' In February 1975 the father called to ask '' 'Can I get custody if [the mother] is smoking marijuana?' '' According to Davis, it was March 1975 when the father first related anything to her about any alleged abuse of his daughter.

During the summer of 1974, the mother permitted the paternal grandmother to take the child to Oregon to stay at her ranch home there. In early July, however, in response to a request from the child's maternal grandmother in Billings, Montana, the child was put on a plane to Billings so she could spend part of the summer with her mother's relatives in Montana. When she arrived in Billings, the maternal grandmother noticed that the child's hair was matted with blood and pus around one ear. She had heard earlier from the other grandmother that the child had ear problems, but that the mother was unwilling to have the condition treated by a physician. The maternal grandmother obtained medical assistance for the child and by the time she returned to Los Angeles in August the condition, a bad infection, had cleared up.

The maternal grandmother accompanied the child on the return trip to Los Angeles and spent about three days in the mother's apartment. During that visit she observed the deprived conditions under which her daughter and granddaughter lived. She also observed the father in the company of the mother and Bridges and noticed that the father appeared friendly toward Bridges.

The child remained in the mother's custody for the next several months, but her paternal grandmother continued to care for her on weekends. The grandmother testified that the child again complained of abuse by Bridges and that she kept the child as much as possible to keep her away from Bridges.

In May 1975 the paternal grandmother, who had remarried, prepared to move to Oregon with her husband. On May 12, shortly after she had left the child with her mother in Venice, she received a call from the mother who told her to come back and get the child "before [Bridges] kills her." When she arrived back at the mother's apartment, the child's clothing was all in the hallway, and the mother told the grandmother, "take her, she can't live with me. She can't live with [Bridges] and I any more." It appeared to the grandmother that Bridges had learned that the child had told about his abuse of her. She also testified that the mother referred to her child as a liar.

The grandmother and her husband kept the child for the next month as they prepared for an extended tour through the western states and Canada. They arrived at the residence of the child's aunt and uncle in Pondera County, Montana, on June 15, 1975, and there shared the full story of the child's life with her mother and Bridges. The child's aunt testified that when she and her husband heard the grandmother's story they were horrified and agreed with her that the child should not go back to her mother.

The aunt and uncle contacted the wife's cousin, an attorney in Great Falls, Montana, who agreed to come to their ranch to talk the situation over. At the attorney's request, the grandmother prepared a letter detailing all she knew of the child's situation, closing with a plea that someone would help her son, the

father, gain custody of the child. The attorney then telephoned the father in California who told him that he was to meet with Kessler in Los Angeles the next day. According to an affidavit prepared by the attorney, he told the father that the child's aunt and uncle were considering filing for custody.

On the following day the grandmother and her husband left for Canada, leaving the child's clothing, medical records, and birth certificate with her aunt and uncle. The grandmother testified that she understood the child would be returned to her in Oregon after she got home from Canada. That same day the Great Falls attorney telephoned Kessler in Los Angeles and discussed the aunt and uncle's desire to keep the child away from her mother, and their doubts concerning the father's willingness or ability to care for the child. He learned from Kessler that the father had not yet filed for the child's custody and stated that Kessler told him that the father was not able to make up his mind about whether to seek custody.

The next day, June 18, the Great Falls attorney again called Kessler to inform him that the aunt and uncle had decided to seek permanent custody and that a complaint would be filed in Pondera County on June 20, when the child's maternal grandparents could come from Billings, Montana, to sign it. He further informed Kessler that the aunt and uncle would have a temporary custody and restraining order issued to them at that same time. The order granting temporary custody to

the aunt and uncle was signed on June 19, 1975.

On June 19, 1975, the father, having been informed that an action was about to be filed in Montana, filed a separate action in Los Angeles County to have custody changed to himself, alleging that the mother was unfit because she had permitted the child to be abused. He subsequently obtained a stipulation from the mother agreeing to a change of custody and on July 7 the Los Angeles County Superior Court granted custody to the father.

On June 24, 1975, the grandmother, father, and a friend of the father's appeared at the aunt and uncle's ranch in Pondera County and took the child away, intending to fly her back to California. With the assistance of the sheriff, however, the aunt and uncle recovered the child that same evening.

Two years later, in August 1977, the Pondera County District Court, sitting without a jury, in Great Falls, heard oral and deposition testimony from the parties named in the aunt and uncle's custody petition. Both the father and paternal grandmother appeared and testified, but the child's mother did not appear. At the recommendation of a Great Falls clinical psychologist, the District Court did not ask the child whether she wanted to stay with her aunt and uncle or return to her father. Her interests in the case were represented, however, by the Cascade County attorney.

Following the hearing the District Court ruled that the natural parents had abused and abandoned their

child, ordered the termination of parental rights of both natural parents and awarded full custody of the child to her aunt and uncle. It also appointed the aunt and uncle general guardians for the child for the duration of her minority.

The specific conclusions upon which the court relied in entering its orders were that the conduct of the natural parents constituted abuse and abandonment of their minor child, and that this conduct rendered them "unfit to have or regain" the "care, custody, and control" of her. Further the court concluded that the best interests of the child required that she be "free from the dominion" of her parents and placed in the full and complete care of her aunt and uncle.

The District Court made lengthy and detailed findings concerning the circumstances under which the child had been raised during her first five years. In particular, these findings focus on the activities of the father during the time his daughter lived in Los Angeles County. These findings show that the father had not sought custody when his marriage was dissolved despite his knowledge of his wife's relationship with Bridges, of his wife's and Bridges' use of drugs, and of his wife's apparent mental illness. They show that the father grossly misrepresented his assets at the time of the dissolution by declaring that property which he owned by inheritance was worth $1000, when in fact it had been appraised at $54,400 ten years earlier (and which he sold for $108,000 in 1973);

that the California Superior Court ordered the father to pay his wife $25 per week in child support, but that he in fact paid only $30 for the support of his daughter from July 1, 1971 to January 1973, at which time he was ordered to appear in response to a contempt citation issued by the Los Angeles County Superior Court; that the father hired counsel to represent him at the contempt hearing and obtained a reduction of his support obligation to $66 per month, commencing December 1, 1973, while in the meantime he had sold his inherited property, and after distributions to other heirs received $99,400 in cash on August 30, 1973; that the father continued to neglect his reduced support obligation and was again cited for contempt and ordered to appear in February 1975; that the father meanwhile purchased a home for $38,000 and remodeled it, and did "little in the way of serious employment" despite the fact that he declared himself to be a musician and photographer; that his actual annual income, except for the year in which he sold his inherited land, has never exceeded $4,000; that the father knew as early as February 1974 that his daughter had reported to her grandmother that she had been sexually molested by Bridges, that she had observed her mother and Bridges being injected with hypodermic needles, that she was living in filthy conditions, but that despite this knowledge he failed to either pay his "minimal" support obligation or to commence proceedings to regain custody; that it is incredible that

the father would doubt his daughter's truthfulness when she "described in detail" the unnatural sexual acts which she had been compelled to endure; that the father failed to commence any proceedings on behalf of his daughter until she was outside of California, and then only after he had been informed that the aunt and uncle intended to commence such an action; that the evidence showed that the father had talked to two lawyers about the possibility of gaining custody of the child, but that he had not made up his mind to do so until informed of the Montana action; and finally, that when he did at last commence an action, he relied entirely upon evidence of sexual molestation of which he had known for at least sixteen months.

On the other hand, the court relied upon the testimony of the psychologist and others in finding that during the two years prior to trial, the child had lived with her aunt and uncle and had become well adjusted to her circumstances and that her condition had changed from a nervous, hyperactive and anxious child to a secure and comfortable child. It found specifically that the aunt and uncle are fit and proper persons to be awarded custody.

Finally the court found that the natural father had never had a "viable parent-child relationship" with his daughter.

Three principle matters must be decided on this appeal:

1. Did the Montana District Court have jurisdiction to modify an extant California decree?

2. Did the evidence presented to the District Court support its determination that the child was abused and abandoned by both parents?

3. Did the District Court have jurisdiction to name the child's aunt and uncle general guardians of the child?

The first issue is technically complex. It involves the effect of plaintiffs' failure to obtain personal service of process on the father; the effect of the father's appearance in the Montana proceeding; the effect of the **ex parte** proceeding by which the father obtained a modification of custody in the California Superior Court; the effect of Montana's enactment of the Uniform Child Custody Jurisdiction Act during the pendency of these proceedings; and finally, the effect of the full faith and credit clause of the United States Constitution. We hold that the District Court had jurisdiction to modify the California decree.

Personal Jurisdiction Over the Father.

The District Court, on July 1, 1975, obtained personal jurisdiction over the mother and Bridges by personal service of process in California. Efforts by the Los Angeles County sheriff's department to serve process on the father were unsuccessful. Thus, the father contends that he was not subject to the District Court's jurisdiction. He contends further that his

appearance at the hearing on plaintiffs' petition did not serve to confer the court with **in personam** jurisdiction over him.

Montana's Rule 4B(2), M.R.Civ.P., which has no counterpart in the federal rules of civil procedure provides that a court obtains **in personam** jurisdiction over a person when that person voluntarily appears:

> "Jurisdiction may be acquired by our courts over any person through service of process as herein provided; **or by the voluntary appearance in an action by any person** either personally, or through an attorney, or through any other authorized officer, agent or employee." (Emphasis added.)

Additionally, courts and commentators are quite willing to distinguish child custody cases in which courts act as arbiters between disputing parents from dependent and neglect and abuse cases when the court stands as **parens patriae** seeking to assist the welfare of the abused, abandoned, or neglected child. H. Clark, **Law of Domestic Relations**, §18.2 at 610-11 (1968); Hazard, May v. Anderson: Preamble to Family Law Chaos, 45 Va.L.Rev. 379, 398, 404 (1959); Currie, Justice Traynor and the Conflict of Laws, 13 Stan.L.Rev. 719, 768 (1961). As declared by the Arizona Court of Appeals in a recent termination of parental rights decision:

> ". . . when the issue is primarily between the state in its **parens patriae** capacity and an absent non-consenting spouse, the state is justified in providing for effective termination

proceedings, even in the absence of in personam jurisdiction over a non-consenting parent.'' In Re Appeal in Maricopa County, Juvenile Action No. JS-734 (1975), 25 Ariz. App. 333, 543 P.2d 454, 459.

In light of the weight of authority, we must agree that personal jurisdiction over a parent is not necessary to the termination of his parental rights to a minor child, so long as the parent has actual notice of the termination proceedings or the District Court, under Rule 4D, M.R.Civ.P., makes an effort reasonably calculated to provide notice to the parent. See, Commissioners' Note, Uniform Child Custody Jurisdiction Act, Section 13, 9 Uniform Laws Annot. 121 (1973) (''Personal jurisdiction over the father is not required . . . The Act emphasizes the need for the personal appearance of the contestants rather than any technical requirement for personal jurisdiction.''); Armstrong v. Manzo (1965), 380 U.S. 545, 549-50, 85 S.Ct. 1187, 1190-91, 14 L.Ed.2d 62, 65-66; Restatement (Second) of Conflict of Laws §69 (1971). In the case of out-of-state parents, see Section 5 of the Uniform Child Custody Jurisdiction Act, section 40-7-106 MCA.

Subject Matter Jurisdiction.

The father's second jurisdictional contention is that under the Uniform Child Custody Jurisdiction Act (UCCJA), sections 61-401 to -425, R.C.M. 1947, now sections 40-7-101 to -125 MCA, the California court, rather than the Montana court, had jurisdiction to

determine the custody of his child. To consider this argument, it is necessary to examine the effect of the enactment of the UCCJA following the commencement of the aunt and uncle's action under section 61-111, R.C.M. 1947, now section 40-6-233 MCA, to terminate the parental rights of the natural parents.

This action was commenced on June 19, 1975, more than two years before the July 1, 1977, effective date of the UCCJA. The father contends that the Act must control the District Court's jurisdiction despite its later enactment, while the aunt and uncle citing section 12-201, R.C.M. 1947 now section 1-2-109 MCA, argue that the Act cannot be retroactively applied because it is substantive and does not, by its express terms, apply to actions which had already been commenced.

A nearly identical situation was recently considered in a New York UCCJA case, Pitrowski v. Pitrowski (1979), 412 N.Y.S.2d 316. The court described the changes set forth in its newly adopted UCCJA as procedural and acknowledged the general rule that such statutes are to receive retroactive application to actions commenced prior to the effective date of the statute. It reasoned, however, that ''different considerations arise'' if the question is whether the procedural changes embodied in the statute are to be applied to actions previously taken in the pending proceeding. The court held that in the absence of a clear legislative intent, the pre-UCCJA jurisdictional standards would apply to the court's preeffective date jurisdictional rulings:

" 'In other words, while procedural changes are, in the absence of words of exclusion, deemed applicable to "**subsequent** proceedings in pending actions" [citation omitted], it takes a "clear expression . . . of the legislative purpose to justify" a retrospective application of even a procedural statute so as to affect proceedings **previously taken** in such actions. [Citations omitted.]' " 412 N.Y.S.2d at 320, (quoting Simonson v. International Bank (1964), 14 N.Y.2d 281, 289-90, 200 N.E.2d 427, 432, 241 N.Y.S.2d 433, 440.) (Emphasis in original.)

Applying this principle to the present case, the jurisdictional rulings which the District Court entered prior to July 1, 1977, are not subject to the UCCJA. The requirements of the Act, however, are applicable to subsequent jurisdictional determinations including the District Court's ultimate determination that it had jurisdiction to modify the California custody decree.

While the District Court was not, as of the commencement of this proceeding, bound by the jurisdictional requirements of the UCCJA, it is nonetheless prudent to inquire whether the facts which existed on June 19, 1975, would have permitted the District Court to take jurisdiction of the case had the Act been effective on that date. If the facts as of that date would not have justified the assumption of jurisdiction, the court's ultimate custody order is not entitled to recognition and enforcement by other UCCJA states under Section 13 of the Act, section 40-7-114 MCA. In the present case, facts meeting the

jurisdictional standards of the Act did exist on the date the action was filed.

The UCCJA attempts to avoid protracted interstate child custody litigation by reducing competition among courts which might otherwise issue conflicting custody orders:

> "The Act is designed to bring some semblance of order into the existing chaos. It limits custody jurisdiction to the state where the child has his home or where there are other strong contacts with the child and his family. See Section 3. It provides for the recognition and enforcement of out-of-state custody decrees in many instances. See Sections 13 and 15. Jurisdiction to modify decrees of other states is limited by giving a jurisdictional preference to the prior court under certain conditions. See Section 14. Access to a court may be denied to petitioners who have engaged in child snatching or similar practices. See Section 8. Also, the Act opens up direct lines of communication between courts of different states to prevent jurisdictional conflict and bring about interstate judicial assistance in custody cases." Commissioners' Prefatory Note, Uniform Child Custody Jurisdiction Act, 9 U.L.A. 101 (1973). See also, Bodenheimer, Progress Under the Uniform Child Custody Jurisdiction Act and Remaining Problems: Punitive Decrees, Joint Custody, and Excessive Modifications, 65 Cal.L.Rev. 978, 982-83 (1977).

The Act establishes a two-tiered jurisdictional test which a court must find satisfied before it makes even an initial custody decree, and a further jurisdictional

test which limits a court's power to modify an out-of-state decree. It is the two-tier test that must first be examined. See, Note, 60 Minn.L.Rev. 820, 827-30 (1976).

The general jurisdictional provisions of the UCCJA are found in section 40-7-104 MCA, incorporating by reference section 40-4-211 MCA. This section details four separate bases of jurisdiction. The first is if this state is the child's home state or has been the home state within the six months prior to the commencement of the custody proceeding. Section 40-4-211(1)(a) MCA. "Home state" is defined as the state in which the child has lived with a parent or parents or someone acting in the capacity of a parent for at least six months. Section 40-7-103(5) MCA. Second, a court may have jurisdiction if it is in the best interests of the child to do so because the child and one or both of his parents (or contestants) has a significant connection with this state and because substantital evidence concerning the child's care, protection, training, and personal relationships is available here. Section 40-4-211(1)(b) MCA. Third, if the child is present in this state and has been abandoned or requires emergency protection because he has been threatened with mistreatment or abuse or is neglected or dependent, the court may take jurisdiction under the ordinary **parens patriae** power. Section 40-4-211(1)(c) MCA. Fourth, a court is empowered to take jurisdiction if no other state has jurisdiction under the first three grounds or another

state has refused jurisdiction and if it is in the best interest of the child that the court do so. Section 40-4-211(1)(d) MCA.

The facts of this case indicate that the child had been left in Montana because in May and June of 1975 she was not wanted by either of her parents. Her mother had explicitly rejected her and her father, though professing a desire for her presence and company, had permitted her to be left with his former wife's relatives more than 1000 miles away. He had taken no action to gain his daughter's custody even after his former wife had made it clear that the child could not live with her and was in physical danger from her boyfriend. Section 40-4-211(1)(c) MCA provides:

> "A court of this state competent to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree if:
>
> "...
>
> "(c) the child is physically present in this state and:
>
> "(i) has been abandoned; or
>
> "(ii) it is necessary in an emergency to protect him because he has been subjected to or threatened with mistreatment or abuse or is neglected or dependent."

The Commissioners' Note to this section describes it as a retention and reaffirmation of parens patriae jurisdiction but cautions that it is to be used only in "extraordinary circumstances." 9 Uniform Laws Annotated 108 (1973). See also, Irene R. v. Inez H.

(1978), 410 N.Y.S.2d 53, 55; Bodenheimer, supra, 65 Cal.L.Rev. at 992-951; Foster and Freed, Child Snatching and Custodial Fights: The Case for the Uniform Child Custody Jurisdiction Act, 28 Hastings L.J. 1011, 1020-21 (1977). In view of the circumstances attending the child's presence in Montana in June 1975, we conclude that the District Court was justified in accepting jurisdiction. The facts at that time met the jurisdictional standards of section 40-4-211(1)(c) MCA, because the child was present in Montana, had been abandoned by both of her natural parents and had been subjected to and threatened with further mistreatment and abuse.

The second tier of the initial jurisdictional test is found in section 40-7-108 MCA, a complex section describing inconvenient forum considerations. This section authorizes a District Court to "decline to exercise its jurisdiction" any time before entry of a decree if it finds that it is an "inconvenient forum" and that a court of another state is a "more appropriate forum." The section describes several criteria by which a District Court may consider whether it is an inconvenient forum, but does not create a mandatory duty on the court to dismiss the action upon such grounds. The section is entirely discretionary. Thus, while the father contends that the Montana court was an inconvenient forum under the criteria of Section 7(c), section 40-7-108(3) MCA, the Act specifically leaves the inconvenient forum determination within the full discretion of the trial court. We find no abuse of the trial court's discretion.

Jurisdiction to Modify the California Decree.

A second limitation on the District Court's jurisdiction arises when a decree of another state is already in force. In the present case, the California Superior Court had first granted custody to the child's mother. Then, by a modification decree dated July 7, 1975, granted custody to the father. The father argues that the UCCJA and the full faith and credit clause prohibit a modification of the decree by the Montana court.

The United States Supreme Court has not ruled explicitly whether the full faith and credit clause applies to custody decrees. Past decisions of this Court, however, have treated the clause as a limitation on a Montana court's jurisdiction to modify custody determinations made by other states. Carroll v. White (1968), 151 Mont. 332, 443 P.2d 13.

While the United States Supreme Court has not specifically held whether the clause is applied in any custody cases, it has refused to apply it to particular cases in which the procedure in a state court was not considered adequate. Of particular relevance is Ford v. Ford (1962), 371 U.S. 187, 83 S.Ct. 273, 9 L.Ed.2d 240. In Ford a Virginia court awarded custody of children to their mother. Some months later the father petitioned the same court for a modification of the decree, but before the court entered judgment on his petition, the parties agreed to a modification and so notified the court, which dismissed the petition. Subsequently, the

mother moved to South Carolina and petitioned a court of that state to regain custody of the parties' children. The father defended his custody on the basis of the agreement and the Virginia court's dismissal in response to that agreement. The United States Supreme Court held that the South Carolina courts were not bound by the dismissal of the Virginia petition for modification. In so ruling, the Court cited several considerations which are relevant here:

> "The Virginia court held no hearings as to the custody of the children. In entering its order of dismissal, the court neither examined the terms of the parents' agreement nor exercised its own judgment of what was best for the children. The court's order meant no more than that the parents had made an agreement between themselves. . .
>
> ". . .
>
> ". . . we do not believe that, in view of Virginia's strong policy of safeguarding the welfare of the child, a court of that State would consider itself bound by a mere order of dismissal where, as here, the trial judge never even saw, much less passed upon, the parents' private agreement for custody and heard no testimony as to what would be best for the children." 371 U.S. at 193-94, 9 L.Ed.2d at 244-45, 83 S.Ct. at 276-77.

These same considerations are applicable here. While the Los Angeles County Superior Court at least appears to have viewed the substance of the stipulation between the natural parents, it is a matter of record that no hearing was held, the court heard no testimony

regarding what would be best for the child, and therefore could not have exercised its own judgment of what was "best" for the child. Thus, because these were precisely the issues which the Montana court heard and decided, it is no more bound to follow the California court's decree than was the South Carolina court bound to follow the Virginia order in **Ford**.

Similarly, we conclude that the Montana court was not prevented from modifying the California decree by the UCCJA. A central purpose of the Act is to reduce interstate competition for a child's custody by requiring recognition and enforcement of one state's decrees by the courts of other states. However, before the recognition and enforcement provisions of the Act can be applied, the initial decree must be entered in conformity with strict notice requirements.

Section 13 of the UCCJA, section 40-7-114 MCA, provides for the recognition and enforcement of out-of-state custody decrees:

> "The courts of this state shall recognize and enforce an initial or modification decree of a court of another state which had assumed jurisdiction under statutory provisions substantially in accordance with this chapter or which was made under factual circumstances meeting the jurisdictional standards of the chapter, so long as this decree has not been modified in accordance with jurisdictional standards substantially similar to those of this chapter."

Section 14 of the Act, section 40-7-115 MCA, limits a District Court's jurisdiction to modify the decrees of another state:

> "(1) If a court of another state has made a custody decree, a court of this state may not modify that decree unless it appears to the court of this state that the court which rendered the decree does not now have jurisdiction under jurisdictional prerequisites substantially in accordance with this chapter or has declined to assume jurisdiction to modify the decree and the court of this state has jurisdiction.
>
> "(2) If a court of this state is authorized under subsection (1) and 40-7-109 to modify a custody decree of another state, it shall give due consideration to the transcript of the record and other documents of all previous proceedings submitted to it in accordance with 40-7-123."

The difficulty with the application of these provisions to the present matter arises from the failure of the California Superior Court to comply with the notice provisions of Sections 4 and 5 of the Act, sections 40-7-105 and -106 MCA. See Cal.Civ.Code sections 5153, 5154. Section 40-7-105 MCA provides for notice to, among others, "any person who has physical custody of the child":

> "Before making a decree under this chapter, reasonable notice and opportunity to be heard shall be given to the contestants, any parent whose parental rights have not been previously terminated, and **any person who has**

> **physical custody of the child.** If any of these persons are outside this state, notice and opportunity to be heard shall be given pursuant to 40-7-106." (Emphasis added.)

Section 40-7-106 MCA contains notice requirements when a person to whom notice and opportunity to be heard must be given is in another state. It requires such notice "at least 10 days before any hearing in this state."

"Strict compliance" with these provisions is essential to the validity of a decree:

> "Strict compliance with sections 4 and 5 is essential for the validity of a custody decree within the state and its recognition and enforcement in other states under sections 12, 13 and 15." Note, 9 Uniform Laws Annotated 110 (1973).

Yet in the present case, no notice or opportunity to be heard was even given to the aunt and uncle who had physical custody of the child on June 19, 1975, when the father's modification petition was filed in the Los Angeles County Superior Court. The father acted quickly to obtain a modified order — only seventeen days after his petition was filed. There was no compliance with Sections 4 and 5. Thus, there can be no requirement of recognition and enforcement under Section 13.

A more difficult question arises under Section 14, which requires deference to the continuing jurisdiction of the court which first granted a custody decree. The central idea of that section is that once a state court has

made a custody decree, that state retains an almost exclusive jurisdiction to modify the decree unless it (1) no longer has jurisdictional prerequisites "substantially in accordance" with the Act; or (2) has declined to assume jurisdiction to modify the decree; and (3) the court of this state has jurisdiction. (See, Commissioners' Note to Section 14.)

In this case the initial custody decree granted the child to her mother. At that point California became the "prior state" and petitions for modification were to be addressed to its courts, as was the father's petition. The father's petition, however, did not give the California court jurisdiction to modify the child's custody because of the failure to notify the persons who had physical custody of her. The father had a duty to notify the California court that persons not party to his action for modification had physical custody of the child, section 9(a)(3) UCCJA, Cal.Civ.Code section 5158(1)(c), and that court was required to order those persons to be joined as parties and to notify them of the pending action. Section 10 UCCJA, Cal. Civ. Code section 5159.

The father has maintained throughout this action that the proper forum in which to hear the aunt and uncle's petition is the Los Angeles County Superior Court, yet he neglected the mandatory procedures by which the aunt and uncle would have been made parties to the California action which he commenced in 1975. Now he argues that the matter must be heard once

again in California. We do not believe that the UCCJA requires such a result. Ordinarily if a state which has entered a decree still has jurisdiction under Section 3 of the Act, section 40-4-211 MCA, its courts must be looked to ahead of the courts of another state which subsequently gains jurisdiction. Thus, we must inquire whether California still has jurisdiction under Section 3. Plainly it does not have jurisdiction under Section 3(a)(1) because California is no longer the child's home state. Nor does it have jurisdiction under Section 3(a)(3) because the child is not present in California, or under Section 3(a)(4) because the Montana court has assumed jurisdiction under facts which meet Section 3(a)(3). The only remaining section is 3(a)(2), section 40-4-211 (1)(b) MCA:

> "A court of this state competent to decide custody matters has jurisdiction to make a child custody determination by initial or modification decree if:
> "...
> "(b) it is in the best interest of the child that a court of this state assume jurisdiction because:
> "(i) the child and his parents or the child and at least one contestant have a significant connection with this state; and
> "(ii) there is available in this state substantial evidence concerning the child's present or future care, protection, training, and personal relationships."

The Oregon Supreme Court recently considered whether the courts of Indiana were the more appropriate forum for resolution of a custody dispute under this section in a case in which Indiana had entered the first decree. The mother had secreted two children ages 4 and 8 away from their father who was still in Indiana. Some months after they had left Indiana, she petitioned an Oregon court for a modification of the Indiana decree. It was not until the children had been away from Indiana for eighteen months that the Oregon court heard the case. The Supreme Court observed that the passage of time had eliminated any "significant connection" with Indiana that the children had once had:

> ". . . at the time of the hearing by the trial court the children had no significant connection with Indiana because of the length of time they had been away. In the lives of children 4 and 8 years of age, 18 months is a long time." Marriage of Settle (1976), 276 Or. 759, 556 P.2d 962, 966.

In the present case the passage of time has created an identical loss of "significant connection" between the child and California. She was five years of age when she was left with her Montana relatives. Two years had passed by the time of the hearing, and nearly two more have since elapsed. As the Oregon Supreme Court noted, jurisdiction under Section 3(a)(2) exists only when it is in the best interest of the child because the child and its parents have a significant connection with a state and there is "optimum access to relevant

evidence" Settle, 556 P.2d at 966. See also, Commissioners' Note, 9 Uniform Laws Annotated 107-08 (1973). In this case there is neither. California does not now have jurisdiction under the Act and did not have jurisdiction at the time of the hearing in August 1977. Thus, the District Court was free to enter a new custody order.

The second principle issue raised by this appeal is whether the District Court abused its discretion by terminating the parental rights of the father and mother.

There is more than sufficient substantial, credible evidence to support the findings and judgment of the District Court in relation to the natural parents. The concern has been advanced that the father was not equally culpable. It is undisputed that he had misrepresented his assets to the Superior Court and thereby reduced his potential support obligation. It is a matter of record that the California court was forced to threaten the father with a contempt citation to induce him to provide for his child. These matters in themelves have not been thought to justify a termination of Parental rights. See Matter of J.L.B. (1979),_____ Mont._____, 594 P.2d 1127, 1135, 36 St.Rep 896, 906-07. Nor may the abuse or neglect which the mother and her boyfriend may have shown be attributed to the father. Matter of T.E.R. (1979, ——— Mont. ———, 590 P.2d 1117, 1121, 36 St.Rep. 276, 281.

We find, however, two circumstances to be particularly supportive of the District Court's conclusion that the father had neglected his minor child. First, the father failed to notify the juvenile authorities concerning the plight of his daughter. According to the father's mother, the child repeatedly complained of abuse by her mother's boyfriend over a period of at least one and one-half years. One of the attorneys consulted by the father, Mr. Gewirtz, advised him to notify the juvenile authorities, but the father did not.

Second, it is significant that in May 1975, when the mother forced the child out of her apartment, the child's paternal grandmother, not her father, took care of her. The evidence shows that the child's grandmother took the greatest interest in her while she was living with her mother. The grandmother, not the father, kept her at her home over many weekends. The District Court found specifically that the grandmother was the principle force behind the father's "belated attempts" to obtain custody of his daughter. It also found that no "viable parent-child relationship" has ever existed between the father and child.

We must measure these findings against some objective criteria to determine whether the father's conduct amounted to neglect and abuse of parental authority.

> "The abuse of parental authority is the subject of judicial cognizance in a civil action brought by the child or by its relative within the third degree or by the county commissioners of the

> county where the child resides. When the abuse is established, the child may be freed from the dominion of the parent and the duty of support and education enforced." Section 40-6-233 MCA.

In the absence of standards defining abuse in this section, we refer to the standards contained in Chapter 3 of Title 41 on child abuse, neglect, and dependency. Section 41-3-102(2) MCA provides:

> " 'Abuse' or 'neglect' means:
>
> "(a) the commission or omission of any act or acts which materially affect the normal physical or emotional development of a youth. Any excessive physical injury, sexual assault, or failure to thrive, taking into account the age and medical history of the youth, shall be presumed to be nonaccidental and to materially affect the normal development of the youth.
>
> "(b) the commission or omission of any act or acts by any person in the status of parent, guardian, or custodian who thereby and by reason of physical or mental incapacity or other cause refuses or, with state and private aid and assistance, is unable to discharge the duties and responsibilities for proper and necessary subsistence, education, medical, or any other care necessary for the youth's physical, moral, and emotional well-being."

We held in Matter of J.L.B., 594 P.2d at 1136, 36 St.Rep. at 908, that parental deficiencies by themselves, absent some harm to the child, are an insufficient basis upon which to terminate parental rights. In the present case the child was undoubtedly

harmed, although not directly and solely by her father. Yet, he knew of his daughter's circumstances and did nothing to intervene on her behalf. A child in her position has a right to expect more. The father's argument that the courts of California would not modify the original custody without proof of the child's mistreatment wears thin in light of the father's failure to even notify the juvenile authorities that something was wrong. The father's attempt to blame the California court system for his own failure to seek aid for his child for more than a year will not suffice. The District Court concluded that the father had abused his parental authority by neglecting and abandoning his child under these circumstances. We do not find this to be an abuse of the District Court's discretion to weigh the evidence before it and arrive at a "clear and convincing" view of the facts. See Matter of J.L.B., 594 P.2d at 1136, 36 St.Rep. at 908-09.

The final issue presented is whether the District Court had authority to name the child's aunt and uncle as her general guardians. The father contends that the aunt and uncle's complaint did not specifically request the creation of a guardianship and therefore the District Court could not name them as guardians. We do not agree.

The complaint filed in this action sought: (1) To terminate the parental rights of the natural parents; (2) to award full care and custody of the child to her aunt and uncle; (3) to obtain a restraining order against the

mother's boyfriend to prevent him from molesting the child; and (4) for such other relief as the District Court deemed proper.

The District Court clearly had power to authorize a guardianship, the effect of which gives the court continuing supervisory authority over the aunt and uncle's care and provision for the child, under the fourth paragraph of the prayer for relief. Rule 54(c), M.R.Civ.P., provides in part:

> "Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings."

See, Smith v. Zepp (1977), ——— Mont. ———, 567 P.2d 923, 930, 34 St.Rep. 753, 762; 10 C. Wright & A. Miller, Federal Practice and Procedure, §2662 at 96-97.

The statute under which plaintiffs proceeded, section 61-111, R.C.M. 1947, now section 40-6-233 MCA, clearly gives the District Court jurisdiction to terminate parental rights:

> ". . . and when the abuse is established the child may be freed from the dominion of the parent . . ."

Upon the proper termination of parental rights, a District Court is empowered to name a suitable guardian of an unmarried minor. Section 72-5-222 MCA. See Guardianship of Aschenbrenner (1979), ——— Mont. ———, ——— P.2d ———, 36 St.Rep. ——— (no. 14610, decided July 16, 1979).

The judgment of the District Court is affirmed.

s/GENE B. DALY
Justice

We concur:

s/FRANK I. HASWELL
Chief Justice

s/JOHN CONWAY HARRISON
s/DANIEL J. SHEA
s/JOHN C. SHUBY
Justices

PROOF OF SERVICE

State of California)
ss
County of Riverside)

I am a citizen of the United States and a resident of the county aforesaid: I am over the age of 18 years and not a party to the within entitled action: My business address is 1509 N. Main Street, Santa Ana, California 92701.

I served the within

PETITION FOR WRIT OF CERTIORARI

on the

interested parties in said action, by placing a true copy in each of five sealed envelopes with postage thereon fully paid, in the United States mail at Santa Ana, California, addressed to:

APPEARANCES:

Marra, Wenz, Iwen & Johnson
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(Attorneys for Respondents at Trial Level)

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Cascade County Attorney's Office
Carroll C. Blend, Deputy Attorney
Cascade County Courthouse
Great Falls, Montana 59401
(Attorney for Alexandra Schwartze)

Hon. Joel G. Roth
9th Judicial District Court
Great Falls, Montana

Supreme Court of Montana
Office of Clerk
Helena, Montana

I CERTIFY under penalty of perjury that the foregoing is true and correct. Executed on 29 October, 1979 at Santa Ana, California.

JACK GALLAGHER

[redacted]

SUPREME COURT
OF THE UNITED STATES

No. _____

October Term, 1979

79-692

HENRY SCHWARTZE, et al.

Petitioners

vs.

EMIL WENZ, et al.,

Respondents

APPENDIX "B"

PETITION FOR WRIT OF CERTIORARI
TO THE
SUPREME COURT OF MONTANA
Decision: August 1, 1979

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No. 8828
IN THE DISTRICT COURT OF THE
NINTH JUDICIAL DISTRICT OF THE
STATE OF MONTANA,
IN AND FOR THE COUNTY OF PONDERA

EMIL WENZ, et al.,

Plaintiffs,

vs.

DIANE SCHWARTZE, et al.,

Defendants.

FINDINGS OF FACT, CONCLUSIONS OF LAW, JUDGMENT AND ORDER

This cause having come on regularly for trial commencing on the 17th day of August, 1977, and the Plaintiffs all appearing in person, and through their Attorneys, Marra, Wenz, Iwen & Johnson, and the Defendant, Henry Schwartze, appearing in person, and through his Attorneys, Smith, Emmons, Baillie & Walsh, and the Court having heard testimony and taken proof necessary to enable it to render judgment herein, and the default of the Defendants, Diane Schwartze, and Kris Bridges, a/k/a George Leonard, a/k/a Kris Martin, having been duly and properly made and entered herein on the 8th day of November, 1977, and the Court being fully advised in the premises hereby makes the following:

FINDINGS OF FACT

I.

The Plaintiffs, Emil Wenz and Irene Wenz, husband and wife, who reside in Billings, Montana, are the parents of the Plaintiff, Linda Holden and of the Defendant, Diane Schwartze.

II.

The Plaintiffs, John L. Holden and Linda Holden, husband and wife, reside on a ranch in Pondera County, Montana with their four (4) children, namely, Laura, age thirteen (13); Jack, age eleven (11); David, age nine (9); Janell, age six (6) months, and Alexandra Schwartze, age eight (8) years, who has resided with them and has been treated as one of their own children since May 17, 1975.

III.

The Defendants Henry Schwartze and Diane Schwartze were married June 12, 1966. Alexandra Schwartze was born of their marriage on June 20, 1969.

IV.

Diane Schwartze commenced an action for divorce and for the custody of Alexandra Schwartze against Henry Schwartze in the Superior Court of the State of California, County of Los Angeles, hereinafter referrd to as the California Court. The action was not contested by Henry Schwartze and a final decree granting Diane Schwartze a divorce and granting the custody of Alexandra Schwartze to her was entered in the California Court on June 13, 1972, subsequent to the entry of an Interlocutory Decree of Divorce dated August 3, 1971.

V.

The California Court ordered Henry Schwartze to pay $25.00 per week for the support of his daughter Alexandra Schwartze commencing July, 1971. Henry Schwartze executed a declaration of financial statement under penalty of perjury in the California divorce proceeding which was false in that it placed a value of One Thousand Dollars ($1,000.00) on property he owned by inheritance since 1960, which had been appraised at Fifty Four Thousand Four Hundred Dollars ($54,400.00) in 1960 and which was sold by Henry Schwartze for One Hundred Eight Thousand Dollars ($108,000.00) in August, 1973.

VI.

The records and files of the California Court show that Henry Schwartze failed and neglected to provide support for his minor daughter. The payment history report of the California Court Trustee (Exhibit 35) shows that Henry Schwartze paid only Thirty Dollars ($30.00) toward the support of his daughter Alexandra from July 1971, to January, 1973, at which time an Order to Show Cause why he should not be held in contempt for failure to support was issued by the California Court.

VII.

Henry Schwartze obtained counsel to represent him in the California contempt proceeding and as a result of Henry Schwartze's misrepresentations to Diane Schwartze and the California Court, his child support payments were reduced to Sixty-Six Dollars ($66.00) a month com-

mencing December 1, 1973. The evidence discloses Henry Schwartze had received Ninety-Nine Thousand Four Hundred Dollars ($99,400.00) in cash on August 30, 1973, from the sale of some of the real estate which he had owned since 1960, by inheritance.

VIII.

Henry Schwartze did not pay the reduced support payments and the California Court issued a second Order to Show Cause why he should not be held in contempt for failure to pay child support in February, 1975.

IX.

From August, 1973, to the present time, Henry Schwartze used said Ninety-Nine Thousand Four Hundred Dollars ($99,400.00) for the purpose of purchasing a house for which he testified he paid Thirty-Eight Thousand ($38,000.00) or Thirty-Nine Thousand Dollars ($39,000.00); to refurbish said house and to support himself. The tax returns from 1969 through 1976 disclose that Henry Schwartze who declared himself to be employed as a musician and photographer in said income tax returns has, in fact, done very little in the nature of serious employment. His 1976 tax return, for example, shows that he sustained a Two Thousand Two Hundred Sixty-Two Dollar ($2,262.00) loss in his photography business from gross sales of Two Thousand Three Hundred Twenty-Nine Dollars ($2,329.00). The tax returns further show that he earned One Thousand Four Hundred Eighty-Eight Dollars ($1,488.00) in the 2 year period from 1969 through 1970; Eight Hundred Thirty-One Dollars ($831.00) in

1971; Three Thousand Eight Hundred Seventy-Four Dollars ($3,874.00) in 1972, jointly with his present wife; Twenty-One Thousand Nine Hundred Eighty Dollars ($21,980.00) in 1973, jointly that income having been derived principally from the sale of his inherited land; Three Thousand Five Hundred Five and 75/100 Dollars ($3,505.75) jointly in 1974; One Thousand Four Hundred Twenty-Eight and 28/100 Dollars ($1,428.28) jointly in 1975, and One Thousand Ninety Dollars ($1,090.00) jointly in 1976.

X.

Prior to the divorce instituted by Diane Schwartze, Henry Schwartze knew that she was living with the Defendant, Kris Bridges, a/k/a George Leonard, a/k/a Kris Martin, to whom she was not married; that they were using drugs; that Diane Schwartze appeared to be mentally ill, but Henry Schwartze made no appearance in the divorce and custody action for the purpose of attempting to obtain the custody of his daughter, Alexandra Schwartze.

XI.

Since at least February of 1974, Henry Schwartze knew that his daughter, Alexandra Schwartze, not yet five (5) years old, had reported to his mother, Fannie Boller, and later admitted to him, that she had been sexually molested by the Defendant, Kris Bridges, a/k/a George Leonard, a/k/a Kris Martin, the man who was living with her mother.

Henry Schwartze knew that Diane Schwartze and the man with whom she was living were using marijuana; that his daughter not yet five (5) had reported witnessing their taking hypodermic injections from third persons.

Henry Schwartze knew of the poverty and the filthy living conditions his daughter had to endure in addition to the sexual immorality and abuse she was subjected to, and he neither contributed the minimal support required by the California Decree nor commenced any proceedings to obtain the custody of his daughter.

Henry Schwartze knew that Diane Schwartze and his child were on the California welfare rolls.

XII.

In May of 1975, Diane Schwartze delivered the physical custody of Alexandra Schwartze to Fannie M. Boller, mother of Henry Schwartze. Diane Schwartze advised Fannie M. Boller at that time that Alexandra Schwartze would no longer be permitted to live with her and the man with whom she was living. From May of 1975 until June 17, 1975, Alexandra Schwartze remained in the physical custody of Fannie M. Boller, who on June 17, 1975, left Alexandra Schwartze with the Plaintiffs, John L. Holden and Linda Holden, at their home on a ranch in Pondera County, Montana, with a letter which states in part "This is a plea to anyone and everyone concerned to do something to save my granddaughter from any further association with the people her mother, Diane Schwartze, lives with and associates with", outlining and stating further in detail that for three (3) years she was aware from Alexandra's statements to her of the sexual abuse she had been subjected to and the filthy conditions and neglect which Alexandra had been compelled to endure.

XIII.

On June 20, 1975, the Plaintiffs, who are as hereinbefore stated, the maternal grandfather and grandmother and the aunt and uncle of Alexandra Schwartze, commenced these proceedings, and the Honorable Ronald L. McPhillips, the District Judge then presiding, made an Order herein awarding the care, custody and control of Alexandra Schwartze to the Plaintiffs, John L. Holden and Linda Holden, during the pendency of these proceedings, which Order has continued in full force and effect until this day.

XIV.

This Court has jurisdiction over the person of Alexandra Schwartze by virtue of the fact that she was physically and lawfully within the jurisdiction of this Court at the time of the commencement of this action and the Plaintiffs are proper parties to commence this proceeding under and by virtue of the provisions of Section 61-111, R.C.M. 1947.

XV.

This Court finds the testimony of the Defendant Henry Schwartze incredible, that he doubted that his daughter, Alexandra Schwartze, a child of five (5) or six (6) years of age, was telling the truth when she described in detail the unnatural sexual acts which she had been compelled to endure and perform.

XVI.

Henry Schwartze did not institute any proceeding in the State of California for the purpose of obtaining the

custody of Alexandra Schwartze until she was outside of the State of California and in the State of Montana, and after having been informed that the Plaintiffs herein were going to commence this action.

XVII.

The Order awarding temporary custody to the Plaintiffs John L. Holden and Linda Holden pending this hearing was obtained on June 20, 1975, and the Order awarding custody to Henry Schwartze obtained by Stipulation between Diane Schwartze and Henry Schwartze in the California Court was obtained July 7, 1975.

XVIII.

There is evidence that Henry Schwartze talked to an attorney Jerome A. Kessler, in February of 1974, about the possibility of obtaining custody of Alexandra Schwartze; Linn Davis, Mr. Kessler's legal researcher, who has a Juris Doctor degree, testified that Henry Schwartze first brought the subject up in March of 1975. There are, however, no writings, memoranda or other documentation of these conferences although some of Mr. Kessler's records and files relative to this matter have been submitted to the Court and contain detailed notes. There is also evidence in the record that the Defendant Henry Schwartze discussed the matter with Max H. Gewirtz as a result of the urging of his mother, Fannie M. Boller, in May of 1975. The sum and substance of these conferences, however, is that the advice which Henry Schwartze had been given is that the child custody issue would be difficult; traumatic for his child and that Henry

Schwartze did not, in fact, make up his mind to commence any proceedings for the purpose of obtaining custody of his daughter until he knew this proceeding was going to be filed, although there was no change in circumstance, and Henry Schwartze relied almost solely upon the sexual abuse issue which he was aware of since at least February of 1974.

XIX.

This Court finds it incredible that anyone should be of the oipinion that the California Court prior to June 19, 1975 would have doubted the testimony of Alexandra Schwartze, a child of five (5) or six (6) years of age, explicitly describing unnatural sex acts which she had been compelled to perform and endure.

XX.

The conduct of the Defendants Henry Schwartze and Diane Schwartze as found herein, constitutes an abuse of parental authority rendering them unfit to have or to regain the care, custody and control of their minor child, Alexandra Schwartze.

XXI.

During the more than two (2) years that Alexandra Schwartze has resided with her aunt and uncle, the Plaintiffs, John L. Holden and Linda L. Holden, and their family, she has become and has been treated as a member of that family; she has changed from a hyperactive, nervous and anxious child to a well-adjusted child, comfortable and secure in her present environment.

XXII.

This Court agrees with the expert opinion of Edward L. Shubat, PHD., the Clincal Psychologist associated with the Great Falls Clinic of Great Falls, Montana, who has observed the child both at the commencement of the two-year period and two days before the trial of this matter, that Alexandra's adjustment referred to in the previous paragraph, testified to by Dr. Shubat and corroborated by other witnesses, has clearly occurred and this Court further agrees with the opinion of said clinical psychologist that the best interests of Alexandra Schwartze will be served if she is allowed to remain with the Plaintiffs, John L. Holden and Linda L. Holden. It is uncontroverted that the Plaintiffs John L. Holden and Linda L. Holden, are fit and proper persons to be awarded the permanent care, custody and control of Alexandra Schwartze.

XXIII.

The conduct of the Defendant Henry Schwartze constitutes an abandonment of Alexandra Schwartze and an abuse of his parental authority. This Court is of the opinion that the belated attempts of the Defendant Henry Schwartze to obtain custody of Alexandra Schwartze are prompted principally by the urgings of his mother, Fannie M. Boller.

XXIV.

A viable parent-child relationship has never really existed between the Defendant Henry Schwartze and his daughter Alexandra Schwartze, and there is complete estrangement between them at this time. Further, the fitness of the home of the Defendant, Henry Schwartze,

who admittedly has a drinking problem, and his present wife, Carol, who oftentimes travels as a musician and with whom Alexandra has developed no parent-child relationship, is extremely questionable.

FROM THE FOREGOING FINDINGS OF FACT, THE COURT MAKES THE FOLLOWING:

CONCLUSIONS OF LAW

I.

That the conduct of the Defendants Diane Schwartze and Henry Schwartze during the lifetime of their minor child, Alexandra Schwartze, constitutes an abuse of parental authority requiring a forfeiture and waiver of any right whatsoever which they may have had to the care, custody and control of said minor child.

II

That said conduct was such as to constitute an abandonment of said minor child arising from their failure to perform the duties and obligations originating from the legal dominion which the law gives to natural parents.

III.

That the conduct was such as to render the Defendants Diane Schwartze and Henry Schwartze unfit to have or to regain the care, custody and control of the minor child Alexandra Schwartze.

IV.

That the best interests of the minor child Alexandra Schwartze in respect to her temporal, mental and moral welfare requires that the said Alexandra Schwartze must be free from the dominion of the Defendants Diane Schwartze and Henry Schwartze.

V.

That the best interests of Alexandra Schwartze including the protection of her health and welfare require that she be free from the dominion of her natural mother and father, Diane Schwartze and Henry Schwartze, and require that the full and complete care, custody and control of Alexandra Schwartze be awarded to her aunt and uncle, the Plaintiffs herein, John L. Holden and Linda L. Holden.

WHEREFORE, upon due consideration of the law and of the evidence presented,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. That the minor child, Alexandra Schwartze, be and she is hereby freed from the dominion and control of the Defendants, Diane Schwartze and Henry Schwartze, or either of them, from and after the date hereof.

2. That the Plaintiffs, John L. Holden and Linda L. Holden, are fit and proper persons to have the care, custody and control of the aforesaid minor child, and they are hereby awarded the permanent care, custody and control of the minor child, Alexandra Schwartze.

3. That the authority of the Defendants, Henry Schwartze and Diane Schwartze, a/k/a Diane Schwartze Leonard, the natural parents of said Alexandra Schwartze, does hereby cease, and the Plaintiffs, John L. Holden and Linda L. Holden, uncle and aunt of said Alexandra Schwartze, are hereby invested with all of the powers and they shall have all of the responsibilities of a parent toward said

Alexandra Schwartze, a minor, and said John L. Holden and Linda L. Holden may be and they are hereby appointed general guardians of said Alexandra Schwartze for the duration of her minority, without further notice in that this Court finds that the parties and all other interested persons have had adequate notice and the opportunity to be heard herein.

DATED this 28 day of November, 1977.

s/JOEL G. ROTH

District Judge

PROOF OF SERVICE

State of California)

ss

County of Riverside)

I am a citizen of the United States and a resident of the county aforesaid: I am over the age of 18 years and not a party to the within entitled action; My business address is 1509 N. Main, Santa Ana, California 92701.

I served the within

APPENDIX "B"

PETITION FOR WRIT OF CERTIORARI

on the

interested parties in said action, by placing a true copy in each of five sealed envelopes with postage thereon fully prepaid, in the United States mail at Santa Ana, California, addressed to:

APPEARANCES:

Marra, Wenz, Iwen & Johnson
414 Davidson Building
Great Falls, Montana 59401
(Attorneys for Respondents
at Trial Level)

Smith, Emmons, Baillie & Walsh
402 Strain Building
Great Falls, Montana
(Attorneys for Petitioner
at Trial Level)

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Hon. Joel G. Roth
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Great Falls, Montana

Supreme Court of Montana
Office of Clerk
Helena Montana

I CERTIFY under penalty of perjury that the foregoing is true and correct. Executed on 1979 at Santa Ana, California.

JACK GALLAGHER

No. 79-692

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979

HENRY SCHWARTZE, et al.,

Petitioners,

v.

EMIL WENZ, et al.,

Respondents.

ON PETITION FOR
A WRIT OF CERTIORARI
TO THE
SUPREME COURT OF MONTANA

RESPONDENTS' BRIEF IN OPPOSITION

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OPINION BELOW

In addition to the opinion of the Montana Supreme Court appended to the Petition which was delivered August 1, 1979, a Petition for Rehearing was denied September 11, 1979; a copy of that order is appended to Respondents' Brief in Opposition. (Res. Brief, A. p. 1)

JURISDICTION

Respondents do not question the jurisdiction as set forth in the Petition.

QUESTION PRESENTED FOR REVIEW

Respondents are astounded by the multiplicity of questions asserted by Petitioner. A cursory analysis of the proffered questions sustains the conclusion that all are either solely questions for state determination or are variations of the one possible federal question which might be presented here for review. That is:

Whether the State of Montana must give full faith and credit to a California custody order under facts, summarized as follows:

> A custody proceeding was brought in Montana by the maternal grandparents and an aunt and uncle on behalf of a minor child physically in Montana, against both natural parents. The natural parents had been previously divorced in California and the initial divorce decree awarded custody to the natural mother.
>
> After commencement of the Montana action, but prior to a trial on the merits in Montana, the father obtained an Order granting him custody pursuant to a stipulation with the mother. The California Order was obtained with full knowledge of the pending Montana proceeding, without any hearing on the merits by the California Court; without notice to the California Court of the pendency of the action in Montana; without notice or opportunity to appear to either the Petitioners in Montana or the Montana Court as required by California statutes;

thereby precluding any inquiry by Montana into the merits in the Montana custody proceeding.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to and, where necessary, in clarification of the matters set forth in the Petition, Respondents submit the following:

(1) The cross-referencing of comparative sections of the Uniform Child Custody Jurisdiction Act in California and Montana by Petitioner at pp. 6-27 of his Petition is in error. Respondents therefore submit the following table:

California Civil Code (12A West's Annotated Cal. Codes (Supp.) pp.135-149)	Montana Code Annotated (9 MCA pp. 31-32, 78-85)	Uniform Child Custody Jurisdiction Act (9 ULA pp. 111-169)
§5150	§40-7-102	§1
§5151	§40-7-103 (modified)	§2
§5152	§40-4-211	§3
§5153	§40-7-105	§4
§5154	§40-7-106	§5
§5155	§40-7-107	§6
§5156	§40-7-108	§7
§5157	§40-7-109	§8
§5158	§40-7-110	§9
§5159	§40-7-111	§10
§5160	§40-7-112	§11
§5161	§40-7-113	§12
§5162	§40-7-114	§13
§5163	§40-7-115	§14
§5164	§40-7-116	§15
§5165	§40-7-117	§16
§5166	§40-7-118	§17
§5167	§40-7-119	§18
§5168	§40-7-120	§19
§5169	§40-7-121	§20
§5170	§40-7-122	§21
§5171	§40-7-123	§22

§5172	§40-7-124	§23
§5173	§40-7-125	§24
§5174	§40-7-101	§26

(2) California Civil Code Section 4600 (12 A Cal. Code Annotated [Supp.] 54:)

"§4600. Custody order; preferences; findings; allegations; exclusion of public.

In any proceeding where there is at issue the custody of a minor child, the court may, during the pendency of the proceeding or at any time thereafter, make such order for the custody of such child during his minority as may seem necessary or proper. If a child is of sufficient age and capacity to reason so as to form an intelligent preference as to custody, the court shall consider and give due weight to his wishes in making an award of custody or modification thereof. Custody should be awarded in the following order of preference:

(a) To either parent according to the best interests of the child * * * .

(b) To the person or persons in whose home the child has been living in a wholesome and stable environment.

(c) To any other person or persons deemed by the court to be suitable and able to provide adequate and proper care and guidance for the child.

Before the court makes any order awarding custody to a person or persons other than a parent, without the consent of the parents, it shall make a finding that an award of custody to a parent would be detrimental to the child and the award to a nonparent is required to serve the best interests of the child. Allegations that parental custody would be detrimental to the child, other than a statement of that ultimate

fact, shall not appear in the pleadings. The court may, in its discretion, exclude the public from the hearing on this issue."

(3) Section 40-6-233 Montana Code Annotated (9 MCA 75):

"40-6-233. Remedy for parental abuse. The abuse of parental authority is the subject of judicial cognizance in a civil action brought by the child or by its relative within the third degree or by the county commissioners of the county where the child resides. When the abuse is established, the child may be freed from the dominion of the parent and the duty of support and education enforced."

(4) Section 45-5-304 Montana Code Annotated (9 MCA 224):

"45-5-304. Custodial interference. (1) A person commits the offense of custodial interference if, knowing that he has no legal right to do so, he takes, entices, or withholds from lawful custody any child, incompetent person, or other person entrusted by authority of law to the custody of another person or institution.

(2) A person convicted of the offense of custodial interference shall be imprisoned in the state prison for any term not to exceed 10 years.

(3) A person who has not left the state does not commit an offense under this section if he voluntarily returns such person to lawful custody prior to arraignment. A person who has left the state does not commit an offense under this section if he voluntarily returns such person to lawful custody prior to arrest."

(5) Rule 4B(2) Montana Rules of Civil Procedure (6 MCA 88):

> "(2) Acquisition of jurisdiction. Jurisdiction may be acquired by our courts over any person through service of process as herein provided; or by the voluntary appearance in an action by any person either personally, or through an attorney, or through any other authorized officer, agent or employee."

STATEMENT OF THE CASE WITH FACTS MATERIAL TO THE CONSIDERATION OF THE QUESTIONS PRESENTED

Respondents are constrained to restate the case for the reason that, where particularly significant, Petitioner's statement (Petition, pp. 28-34) is not supported by the record. Respondent's statement of the case follows:

1. Petitioner, Henry Schwartze, is a resident of California. Respondents, Emil Wenz, Irene Wenz, John Holden and Linda Holden, are residents of Montana.

2. Alexandra Schwartze, the ten-year-old child the subject of this proceeding, is the daughter of Henry Schwartze and Diane Schwartze (Diane Schwartze and her present husband, referred to in the Petition as Bridges, were Defendents below where judgment was entered against them; they have not appeared here).

3. Respondents, Emil Wenz and Irene Wenz, are the maternal grandparents of Alexandra Schwartze and the parents of Diane Schwartze and Respondent Linda Holden.

4. Respondents John Holden and Linda Holden are husband and wife. They have had physical custody and control of Alexandra Schwartze since June 17, 1975. They have four (4) other children, Laura, Jack, David and Janell, ages 15, 13, 11 and 2 respectively.

5. (All persons involved shall be hereinafter referred to by their first name where possible to facilitate the

presentation of the matter to this Court.) Henry and Diane were married June 12, 1966, in Oregon. They moved to California in 1969 where Alexandra was born June 20, 1969. Henry and Diane separated about December, 1970. Diane commenced a dissolution proceeding in California in 1971; a final Decree of dissolution was entered January 13, 1972. Diane was granted the permanent custody of Alexandra. Henry did not contest the award though he knew that Diane was living with Bridges; that they were using drugs, and that Diane appeared to be mentally ill.

6. After dissolution, Henry made no reasonable effort to comply with his nominal obligation to make child support payments for Alexandra required by the Decree of dissolution. He was twice cited in California to show cause why he should not be held in contempt: January, 1973, and February, 1975. The 1973 proceeding resulted in a decreased child support obligation by reason of a stipulation between Henry and Diane; however, he misrepresented his financial condition to the California Court and to Diane by not disclosing that he had just received almost One Hundred Thousand Dollars ($100,000.00) from the sale of real property.

7. From February, 1974, Henry knew that Alexandra, not then five (5) years of age, had reported to his mother, Fannie Boller, that she was being sexually abused by Bridges, with whom Diane was still living. Fannie Boller, a retired nurse married to a retired doctor, had observed signs of abuse on Alexandra's person. Henry was aware of the abhorrent living circumstances of Alexandra. He seldom saw his daughter, claiming at trial that he often did not know where she was; however, his mother Fannie knew where Alexandra was at all times, seeing her at least weekly.

8. On May 12, 1975, Alexandra was thrown out by Diane. That day Diane called Fannie Boller (not Henry) and told her to take the child, stating that Alexandra

could not live with her any more. Diane also then gave Fannie most of Alexandra's clothes and medical records. Thereafter, Alexandra stayed with Fannie Boller. She began traveling with Fannie Boller and her husband, first to Oregon and then to Montana, arriving June 15, 1975, at the ranch of John and Linda Holden.[1/]

9. After discussions on June 16, 1975, with the Holdens, Fannie Boller was told by the Holdens that Henry's fitness to have custody as well as that of Diane was suspect. Henry was similarly advised by telephone.

10. On June 17, 1975, Warren Wenz, a Montana attorney and cousin of Linda and Diane, advised Jerome Kessler, Henry's California attorney, that the Holdens wanted custody of Alexandra. Attorney Kessler advised Attorney Wenz that Henry had never been able to make up his mind whether he wanted custody of Alexandra. The same day Fannie Boller left Alexandra with the Holden family, leaving her clothing, medical records and birth certificate.

11. On June 18, 1975, Attorney Wenz advised Attorney Kessler that the Respondents would commence the Montana action (from which this proceeding has resulted) on June 20, 1975. The two-day delay was necessary due to the distances involved between the location of the Montana District Court, the presiding District Judge, and the Respondents.

12. The Montana action was commenced pursuant to Section 40-6-233 MCA which granted the Montana District Court jurisdiction of Alexandra by reason of her presence in the state at that time. "Residing" as used in the statute means mere presence. On June 19, 1975, the

1/ Henry in his Petition states at paragraph 11 of his Statement of the Case (Petition, p. 30) that Alexandra's travels with Fannie Boller were with Diane's "permission". There was no such grant. Diane never retracted from her action May 12, 1975, when she threw Alexandra out.

then presiding District Judge made an order granting temporary custody to John Holden and Linda Holden. The Complaint in the Montana proceeding was filed June 20, 1975, and the Order granting temporary custody to the Holdens was formally entered and issued by the Clerk of that Court. The Holdens retained custody of Alexandra pursuant to that Order until entry of the Judgment and Order of the Montana District Court dated November 28, 1977, under which Order the Holdens have since retained Alexandra.

13. On June 19, 1975, Henry commenced a proceeding in California requesting modification of custody from Diane to himself. His Petition was based on facts he had known for approximately one and one-half years. Diane stipulated to the modification, and on July 7, 1975, an Order was entered which modified the initial California Decree by granting Henry custody of Alexandra. The Order was entered without notice to the Respondents of the Petition and without granting them the opportunity to appear and contest it. The Order was entered without inquiry by the California Court into the merits of the Petition or notice to it of the Montana proceeding; no testimony was taken, the California Court relying (as stated in the Order) upon declarations made by Henry.

14. At all times pertinent hereto the Uniform Child Custody Jurisdiction Act (hereinafter referred to as UCCJA) was in effect in California. The UCCJA and other rules of practice in California required Henry to disclose to the California Court certain factual matters which were mandatory in determining the nature and extent of the jurisdiction of the California Court and the viability of any subsequent order issued by it. Under California Civil Code Section 5158: (1) Henry was required to disclose in his first pleading whether he knew of any person not a party to the proceeding who had physical custody of the child or who claimed to have

custody rights with respect to the child; (2) he was required to also disclose information relating to any custody proceeding concerning the child pending in any court; and (3) he had a continuing duty to inform the California Court of any custody proceeding concerning the child of which he obtained any knowledge during the California proceeding.

An official form for this purpose was available to Henry and should have been used by him; it is set forth verbatim in the 1979 Supplement to Volume 12A West's Annotated California Codes, pp. 143-144. The form is purposely drafted for the required disclosure and highlights the continuing nature of the duty to disclose. Instead of using it, Henry submitted his own typewritten version. He did acknowledge Alexandra was in the physical custody of the Holdens, but did not advise the California Court of the Holdens' claim to custody, although he had such knowledge prior to the filing of his Petition on June 19, 1975, as admitted in paragraph 12 of the Statement of the Case in his Petition to this Court. (Petition, pp. 30-31.)

15. Henry had actual knowledge of the filing of the Montana proceeding at least by June 24, 1975, because of an event which occurred on that date referred to throughout the Petition.[2/] Fannie Boller was advised by Respondents on June 20, 1975 that the Montana proceeding had been filed and that temporary custody had been granted to the Holdens by the Montana District Court. On June 24, 1975, Fannie Boller, Henry and a

2/ Throughout his Petition, Henry erroneously states that this event occurred on July 24, 1975, after he had obtained his California Order, implying that Henry was, at the time, acting under the color of the California Order. This error occurs at pages 5, 38, 41, 42, 43, 46 and 54 of the Petition. The correct date, June 24, 1975, is established by the record and is set forth in the opinion of the Montana Supreme Court. (Petition, p. A8.) Henry was not acting under the color of authority of any California Order.

companion came to Montana to the Holden ranch and forcibly took Alexandra from the Holdens. Henry never personally had physical control of Alexandra during this incident. Alexandra was taken by Fannie Boller who drove off with the companion leaving Henry at the Holden home while Fannie and the companion attempted to abscond with Alexandra.

Due to the violation of Section 45-5-304 MCA, the county sheriff apprehended Fannie Boller and Henry to obtain the return of Alexandra. Because Alexandra was returned, under Section 45-5-304(3) MCA, Fannie Boller and Henry were released and no further action was taken against them.

Though Henry denied it at trial, the evidence established that Henry had actual knowledge of the Montana proceeding prior to June 24, 1975. This included the notes of Henry's California attorney, Kessler, which were made at the time relating to telephone conversations between Attorney Kessler and Henry.

At no time prior to the entry of the California Order on July 7, 1975, did Henry advise the California Court of the existence of the Montana proceeding or the claims of the Holden family.

16. By reason of the failure to provide Respondents with notice of the California proceeding allowing them an opportunity to be heard, the California Court did not have jurisdiction to enter the Order of July 7, 1975. (Cal. Civil Code Section 5153.) For the same reasons, the California Order, pursuant to California statute, had no binding effect upon the Respondents in California and was not entitled to recognition in Montana. (Cal. Civil Code Sections 5161 and 5162.)

17. There were no subsequent proceedings in California.

18. The trial of the Montana proceeding commenced

August 17, 1977. The action was not heard at an earlier date because of unjustifiable delay on Henry's part. The delay at one point resulted in economic sanctions being imposed against him.

Montana adopted by statute the UCCJA, modified in part, effective July 1, 1977. As of the effective date, Montana had continuing jurisdiction to adjudicate the matter under the UCCJA, as adopted, in addition to jurisdiction under Section 40-6-233 MCA. At the effective date of the UCCJA in Montana:

(a) Montana was Alexandra's home state by reason of her presence in Montana for more than two (2) years.

(b) Montana was the only state at that point with which Alexandra had any significant connection. Only in Montana was there substantial evidence concerning the present and future care, protection, training and personal relationships of Alexandra.

(c) California no longer had any jurisdiction over Alexandra as defined by the UCCJA.

19. The decision of the Montana District Court entered November 28, 1977, was unanimously affirmed by the Montana Supreme Court August 1, 1979; a copy of the Findings of Fact, Conclusions of Law, Judgment and Order of the Montana District Court was just submitted by Petitioner as Appendix "B" to his Petition (it was received by Respondents on December 26, 1979). Henry's Petition for Rehearing in the Supreme Court of the State of Montana was unanimously denied September 11, 1979. The Montana Supreme Court held, inter alia, that there was more than substantial, credible evidence to support the findings and judgment of the District Court. The evidence presented by Henry was not found to be credible; his motivations throughout were found to have stemmed from the urgings of his mother, Fannie Boller.

20. The Order of July 7, 1975 of the California Court was not entitled to recognition and enforcement in

Montana. The Full Faith and Credit Clause of Article IV, Section I, U. S. Constitution, does not require that Montana defer to the California Order because child custody decrees in California are modifiable and are, therefore, excepted from its provisions; more importantly, the failure to grant Respondents' basic due process as required by California statutes negates the imposition of its requirements.

21. The paramount consideration, that of Alexandra's welfare and best interests, requires at this point after four and one-half years that the Montana decree remain undisturbed. Alexandra is an integral part of the Holden family, having resided with them almost half her life. More importantly, practically all of her cognitive life has been with the Holdens.

22. For the first time ever, Henry in this Petition, raises in a tangential manner, purported federal questions arising under the Fourth and Fourteenth Amendments to the U. S. Constitution. While such action is not permitted under the Rules of this Court, it is clear that the purported federal questions are without merit.

23. The Petition should be denied.

ARGUMENT

I.

INTRODUCTION

The Petition of Henry Schwartze is replete with unwarranted invective toward the Respondents and the Montana Supreme Court. Petitioner attempts through distortions of the record to create illusions which are urged as factual. Respondents will not attempt to answer each such unfounded assertion or implication for to do so would only dignify the conduct of Petitioner and unjustifiably lengthen this brief. Respondents would only request that this Court disregard the hyperbole of Petitioner and focus upon the facts and law surrounding

the sole federal question stated above. His general thrust is, effectually, a request that this Court act as a court of general appellate jurisdiction, e.g., a second Montana Supreme Court.

The picture of Respondents which Petitioner attempts to paint is that of a very dark, sinister group. In fact, at trial, it was substantively agreed by Henry that Respondents are good, decent people motivated only by their love and affection for Alexandra Schwartze.

The factual record required for this Court to conclude that the Montana Supreme Court acted properly is uncomplicated. The Montana proceeding was commenced on June 20, 1975 pursuant to Section 40-6-233 MCA while Alexandra was physically present in Montana. Her presence conferred jurisdiction over the subject matter of the action (Alexandra) on the Montana District Court. This jurisdictional determination was affirmed implicitly in the decision of the Montana Supreme Court and is not contested by Petitioner here. As stated in Palm v. Superior Court, Cal. App. (1979), 158 Cal.Rptr. 786, at p. 797:

> "It is a fundamental tenet of jurisprudence that a court has power and obligation to determine its own jurisdiction."

The Montana statute authorizes the Respondents to test the conduct of both natural parents, thereby requiring that, at all times, a basic distinction be drawn between such an action and actions solely between natural parents. The State of Montana is called upon to act in its parens patriae capacity. In such cases, as stated in Roebuck v. Bailes, 162 Mont. 71, 508 P.2d. 1057 (1973), at pp. 76-77:

> "It is widely, if not universally, recognized that physical presence of a minor child within the borders of a state invests the courts of that state with jurisdiction to determine custody where the

> welfare of the child is concerned. (Citations omitted) . . .
>
> "The origin and fountainhead of such jurisdiction lies in the power of the state as parens patriae to protect the innocent and helpless found within its borders without regard to their legal domicile. (Citations omitted.)"

Also see In Re Appeal in Maricopa County, Juvenile Action No. JS-734 (1975) 25 Ariz. App. 333, 543 P.2d. 454, where it was stated at page 459:

> "In custody disputes, the controversy is primarily between the divorced parents with the state having a limited interest in the outcome. On the other hand, in adoption or termination proceedings, even where initiated by private parties, the state in its capacity as parens patriae has a very substantial interest . . .
>
> " . . . when the issue is primarily between the state in its parens patriae capacity and an absent non-consenting spouse, the state is justified in providing for effective termination proceedings, even in the absence of in personam jurisdiction over a non-consenting parent."

Also see Thornlow v. Thornlow, (Tex. 1979) 576S.W.2d. 697.

The Respondents obtained physical custody of Alexandra from Fannie Boller on June 17, 1975. They had at least as great a legal right to physical custody of Alexandra as did Fannie Boller. Fannie Boller, the paternal grandmother, was a volunteer acting because the legal custodian, Diane, had literally thrown Alexandra out and given her to Fannie Boller, telling Fannie to take Alexandra because she couldn't live with Diane anymore. This occurred May 12, 1975.

When Alexandra was left in Montana the Respondents knew only that, even though Diane had thrown her out

more than a month earlier, Henry, the child's father, had neither taken physical custody of her nor commenced any proceeding in California to obtain permanent legal custody. They also knew that Henry's lawyer had advised Warren Wenz, a Montana attorney and a relative, that Henry had not been able to make up his mind whether or not he wanted custody of Alexandra. The Respondents had advised both Henry and his mother Fannie, before she left Montana, that they wanted Alexandra to live with them and that they doubted the fitness of either natural parent to have custody.

In addition to custody of the subject of the proceeding (Alexandra), the Montana District Court acquired in personam jurisdiction over Henry upon his voluntary appearance by Answer in the Montana proceeding. M.R.Civ.P. Rule 4B(2).

Belatedly, acting principally in response to the urgings of his mother, after Alexandra had been left in Montana and after having been informed that Respondents were going to commence a proceeding, Henry filed a Petition in California requesting that the grant of custody provided in the initial divorce decree be changed and custody awarded to him, relying solely upon facts known to him for more than one and one-half years.

Ultimately, pursuant to a written stipulation with Diane, without notice to Respondents or any opportunity granted to them to appear in the California proceeding and without notice to the California Court of the Montana proceeding, an Order was entered granting the requested modification on July 7, 1975.

Thereafter, in the Montana proceeding, on three different occasions, Henry urged the Montana District Court that the Order dated July 7, 1975, was entitled to full faith and credit in Montana and that by reason thereof Montana was precluded from looking into any circumstances existent prior to its date. The position was rejected by three different District Judges, as well as by

the Montana Supreme Court in its unanimous decision.

The sole possible federal question presented here is whether that California Order of July 7, 1975, was entitled to full faith and credit in the Montana proceeding. A review must consider the effect, if any, of the adoption in the State of Montana of the UCCJA, effective July 1, 1977, shortly before this matter was tried in Montana in August 1977.

II.
1975

In 1975, Montana had not yet enacted the UCCJA; therefore, there were no statutory guidelines establishing a basis for recognition of custody decrees of other states. While most states which had considered the matter had determined that custody decrees were not entitled to full faith and credit for a variety of reasons, Montana held in Roebuck v. Bailes, supra, that the custody decrees of other states were res judicata in Montana and entitled to full faith and credit on the issue of custody as of the time of the adjudication and any modification thereof in Montana would have to result from changed circumstances since the date of the original decree. In Svennugsen v. Svennugsen, 165 Mont. 161, 527 P.2d. 640 (1974), the Montana Supreme Court qualified this rule by holding that before custody decrees would be found generally to be res judicata, the parties involved must have had an opportunity to contest the issues in the prior proceeding and that proof of unfitness could be substituted for a showing of change in circumstances where the custody issue had not been contested in the prior proceeding.

These Montana decisions are in accord with the decisions of this Court. People v. Halvey, (1947) 330 U.S. 610, 67 S.Ct. 903, 91 L.Ed. 1133, held that, even if the Full Faith and Credit clause applied in custody

situations, the clause would not require a state to honor the terms of a prior custody order of a sister state where, under the circumstances, the prior order could be modified by the rendering state. California Civil Code Section 4600 authorizes modification of custody decrees in that state.

Ford v. Ford, (1962) 371 U.S. 187, 83 S.Ct. 273, 9 L.Ed. 2d 240, held, inter alia, that the Full Faith and Credit clause, if applicable to custody decrees, would only require Montana to recognize a California decree in the instant action if the California Court were bound by it. In Ford, the custody decree in question had been issued in Virginia pursuant to a private agreement between the parties without any hearing on the merits. The Virginia Court neither examined the terms of the agreement nor exercised its own judgment as to what was best for the children involved. Under the circumstances, this Court determined in Ford that South Carolina was not bound by the terms of the Virginia decree. It has been suggested that implicit in Ford is the determination that full faith and credit need not be granted to custody decrees which fail to meet procedural or substantive standards. Ford v. Ford, 73 Yale Law Journal 134, 138 (1963).

Here the California Order of July 7, 1975 recites that it was entered solely upon a reading of the declarations of Henry Schwartze which were submitted in support of the requested modification. (Also before the California Court was the stipulation of Diane consenting to the modification.) This recitation is significant for the declarations formed the basis for a determination that California was in compliance with the provisions of its version of the UCCJA and, therefore, had jurisdiction to enter its Order.

Cal. Civil Code Section 5158 mandatorily required that Henry:

> (1) Disclose any knowledge he had of any person not a party to the California proceeding who

> either had physical custody of the child involved or claimed custodial rights;
> (2) Disclose information relating to any custody proceeding concerning the child pending in any court; and
> (3) Continually inform the court during the California proceeding of any custody proceeding concerning the child of which he obtained any knowledge.

As the Commissioners' Note to this section of the UCCJA indicates:

> "It is important for the court to receive the information listed and other pertinent facts as early as possible for purposes of determining its jurisdiction, the joinder of additional parties, and the identification of courts in other states which are to be contacted under various divisions of the Act." 9 Uniform Laws Annotated 146, Section 9 UCCJA.

As outlined in Respondents' Statement of the Case, Henry never fulfilled his statutory duty to the California Court for he never advised it of the claims of the Holdens to custody or of the pendency of the Montana proceeding.

The purpose of the disclosures is to insure compliance with Cal. Civil Code Section 5153 which commands that before making a decree reasonable notice and opportunity to be heard must be given to (among others) contestants and any person who has physical custody of the minor child involved. "Contestant" and "physical custody" are defined in Cal. Civil Code Section 5151 as follows:

> "(1) 'Contestant' means any person . . . who claims a right to custody . . . with respect to a child'

(8) 'Physical custody' means actual possession and control of a child."

The Holdens qualify on both counts. These uncomplicated definitions are within the spirit of the UCCJA which is intentionally designed to bring all interested parties before a court as soon as conveniently possible. Any limitation would violate that intent.

Henry strenuously argues that the nature of the physical custody of the Holden family at the time of the commencement of the California proceeding did not require any such notice or opportunity to be heard. This disregards the precise language of the UCCJA. At page 45 of his Petition, Henry quotes Professor Brigitte Boddenheimer to the effect that a child's temporary presence in a state under the UCCJA does not confer custody jurisdiction on the visited state. A reading of the context in which the statement was made by Professor Boddenheimer conclusively shows that she was speaking of the jurisdiction of a particular state to hear a custody proceeding. The statement has absolutely nothing to do with the right of a person who either has physical custody or claims custodial rights to notice of a proceeding and an opportunity to appear therein, whether that person resides in or out of the state where the proceeding is pending. Henry erroneously merges two distinct and important principles: (1) jurisdiction, and (2) due process. There is no such term in the UCCJA as "physical custody jurisdiction" as used on page 45 of the Petition.

The Commissioners' Note with reference to California Civil Code Section 5153 declares that:

> "Strict compliance . . . is essential for the validity of a custody decree within the state and its recognition and enforcement in other states ." 9 Uniform Laws Annotated 130.

If the California Court had been properly advised,

Cal. Civil Code Section 5159 required the joinder of the Holdens and notice to them per Cal. Civil Code Section 5154. Under Cal. Civil Code Section 5160, the appearance of the Holdens could have been ordered and jurisdiction over them obtained. Also, prior to proceeding the California Court was under a duty under Cal. Civil Code Section 5155(2) and (3) to consult with the Montana Court. (Actually the California Court should have done this on its own motion as it was at least advised that Alexandra was in the physical custody of the Holdens.) The recent California case of In Re the Marriage of Schwander, Cal. App. (1978) 79 Cal.App. 3d. 1013, 145 Cal.Rptr. 325, supports this view, requiring the joinder of the Holdens. As indicated in the Commissioners' Prefatory Note to the UCCJA, the Act stresses the importance of personal appearance, before the court, of nonresidents claiming custody, and of the child. 9 Uniform Laws Annotated 111, 114.

Cal. Civil Code Section 5161 provides that a custody decree binds all parties who have been served or notified in accordance with Section 5154 and who have had an opportunity to be heard. As to these parties, the decree is conclusive. It elementally follows that the 1975 California Order was not binding upon the Respondents because they did not receive any notice or have any opportunity to be heard. Since the Respondents were not bound by the 1975 California Order, it is not entitled to full faith and credit in Montana under either the prior decisions of this Court or the Montana Supreme Court.

See In Re the Marriage of Verbin, (Wash. 1979) 595 P.2d. 905, which held that a Maryland decree was not entitled to full faith and credit in the State of Washington, where the Maryland court had not been advised of the pendency of the Washington proceeding, and that a court may refuse to give full faith and credit if a decree was so obtained.

The great weight of authority is that where a rendering state had no jurisdiction over a party or parties involved, its decree is not entitled to full faith and credit in sister states. People v. Halvey, supra, at page 906.

Henry acknowledges, in his Petition, that Respondents are not bound in California by the 1975 Order, suggesting that the Respondents have the right to litigate the issue there. It is a non sequitur then to urge that Respondents are bound by the Order in Montana under the most basic interpretation of the Full Faith and Credit clause which requires that before the Order can "bind" in Montana, it must "bind" in California. The inconsistency is fatal to Henry's basic contention.

It is clear, therefore, that when the California Order was presented in late 1975, the Montana District Court under the circumstances was entitled to determine, as it did, that the Order was not entitled to full faith and credit in Montana, and that the action in Montana could proceed. The remaining question relates to the effect, if any, of the adoption by Montana of its version of the UCCJA July 1, 1977, prior to trial on the merits.

III.
1977

The UCCJA does not determine the applicability of the Full Faith and Credit clause to custody decrees. The Act recognizes the sound policy reasons supporting a determination that the clause does not apply to such decrees and it is a legislative response which seeks to resolve the matter as far as possible among states which enact it. There can be no uniform application because each state retains the right to vary the Act by the legislative process and to judicially interpret its intent based upon the needs of each state.

The first question which arises is its application to pending cases. Contrary to the suggestion of Petitioner, the Montana Supreme Court here held the Act to be

applicable to pending cases, but, citing Pitrowski v. Pitrowski (N.Y. 1979) 412 NYS2d. 316, held that the enactment would not disturb jurisdictional rulings made prior to its effective date. (Petition, A. p. 15-16.) Certainly the Act can have no application prior to its effective date. 3/

A review must be made of the facts on July 1, 1977, the effective date. By then Alexandra had been in Montana over two (2) years. She had not even seen her father during that time. She had become integrated into the Holden family. She had attended school and engaged in all other normal activities during that time in Montana. Meanwhile, Henry now also had an admitted drinking problem, in addition to financial difficulties.

Montana had become Alexandra's "home state," defined in Section 40-7-103(5) MCA as the state where she lived for at least six (6) months with a "person acting as a parent" (defined in Section 40-7-103(9) as a person other than a parent who has physical custody and claims a right to custody). The Holdens are surely "persons acting as parents."

Montana became the only state where Alexandra and one of the contestants had any significant connection as defined in Section 40-4-211(b) MCA. See Ratner, Child Custody in a Federal System, 62 Mich. L.Rev.795,818 (1964) who explains:

> "Most American children are integrated into an American community after living there six months; consequently this period of residence would seem to provide a reasonable criterion for identifying the established home."

3/ The discussion by the Montana Supreme Court as to the entitlement of its decision here to binding recognition in other states which have enacted the UCCJA is not a matter before this Court in any form. Petitioner's argument relating to that discussion should be disregarded. The discussion is purely dicta and is not determinative of the issues here.

California no longer had any jurisdiction as defined in the Montana Act because:

(1) It was no longer Alexandra's home state under 40-4-211(a) MCA. It did remain her home state for one year after she left California under Cal. Civil Code Section 5152 (1)(a)(ii), where an extension of six months is granted, because Alexandra was absent from California because she was retained in Montana by the Holdens (persons acting as parents) who claimed custody. Henry had until June 1976 to commence a proper proceeding in California, long after the first determination by a Montana District Court on September 8, 1975, that the July 7, 1975 Order was not entitled to full faith and credit in Montana because the Respondents had not been joined in that proceeding. Henry could have refiled and obtained jurisdiction in California over Respondents in a proper proceeding. He never did. See Boddenheimer, Uniform Child Custody Jurisdiction Act (1969) 22 Vand. L.Rev. 1207, 1225.

(2) Alexandra no longer had any significant connection with California as defined in Section 40-4-211(b) MCA. See Marriage of Settle, (Or. 1976) 556 P.2d. 962 where it was held that after children ages four and eight had been gone for 20 months from Indiana they no longer had any significant connection there as required by this section. (Here Alexandra, age eight, had been gone from California 24 months.)

(3) Alexandra was not physically present which might grant jurisdiction to California under Section 40-4-211(c) MCA. Further, Montana was exercising jurisdiction precluding the operation of Section 40-4-211(d).

Therefore, Montana need not defer to California under the requirements of Section 40-7-115(1) MCA because California (in 1977) did not have the necessary jurisdictional prerequisites substantially in accordance with the Montana Act. This analysis shows conclusively that Montana did not "bootstrap" itself into jurisdiction under the Montana UCCJA. Montana always had jurisdiction and continued to have it under the UCCJA. California also had jurisdiction initially but lost it when Henry did not proceed properly in his initial proceeding and took no corrective action to cure his defective procedure. Instead he chose to voluntarily appear in Montana by commencing discovery in late 1975 and by filing his Answer to the Complaint on May 27, 1976, where the issues involved were vigorously tried, and after presentation of all the evidence, the Montana Supreme Court found more than substantial credible evidence to support the judgment of the District Court.

Henry misrepresents the decision in California in Palm, supra, at page 39 of his Petition where he quotes from a dissenting opinion. In fact, in Palm, California recognized that North Dakota had concurrent jurisdiction with it (which can occur under the UCCJA) and that even though California was the "home state" of the child involved and North Dakota was only a state visited infrequently, California would defer to North Dakota since it had assumed jurisdiction by concluding it was a state with which the child had significant contact. North Dakota is also a UCCJA state. At pages 49-51 of the Petition, Henry again quotes from Palm, suggesting that Montana could not act because California retained jurisdiction. The fallacy of this argument has been outlined above; further, the decision by the Montana Supreme Court, implicit in its opinion, that California retained no continuing jurisdiction, is solely one for state determination.

Respondents respectfully contend that as of July 1, 1977, the only state with jurisdiction was Montana. By his own conduct, Henry caused the State of California to lose any continuing jurisdiction it might have had after Alexandra left there in 1975 (although such continuing jurisdiction would not have precluded action by Montana under the UCCJA).

IV.
Conclusion

The scope of the UCCJA is limited to states which enact it— 27 as of this date. The Act is not intended to derive any sustenance from the Full Faith and Credit clause of the U. S. Constitution. Its intent is to provide a statutory scheme of interstate recognition of custody decrees. Strict compliance with the due process mandates of notice and opportunity to appear is the bedrock of the Act. Absent such strict compliance, there is no statutory entitlement to recognition, just as there would be no entitlement generally to recognition under the Full Faith and Credit clause.

The decision of the Montana Supreme Court is in compliance with the prior decisions of this Court in Halvey, supra, Ford, supra, and Armstrong v. Manzo, (1965) 380 U.S. 545, 85 S.Ct.Rptr.1187, 14L.Ed.2d.62.

The 1975 California Order received the same effect in Montana as it was entitled to receive in California (there was no showing it did not). Because the California Order was subject to modification there, under Halvey, supra, it was not entitled to full faith and credit in Montana. Also, because the Respondents were not granted the basic due process rights mandated by statute, the California Order was not entitled to full faith and credit in Montana under Ford, supra, or Armstrong v. Manzo, supra.

The California Order was nothing but a sham. It was

obtained by deceit practiced on the California Court. Its sole purpose was to preclude a hearing on the merits because Henry knew what the result of such a hearing would be— that which occured at the trial in Montana. The Full Faith and Credit Clause can not be used to ratify such conduct.

The UCCJA does not and cannot alter the application of the Full Faith and Credit clause for the sound reasons expressed by this Court in its prior decisions.

After more than four and one-half years the compelling best interests of a little girl, Alexandra Schwartze, require that this matter be concluded and that she be allowed to remain where she is loved and accepted as an equal member of a happy family. Even Henry acknowledged at trial that Alexandra is an integral part of the Holden family. The rights and desires of any other person or state must be subordinated to that compelling necessity after this length of time. Her childhood is fast passing, as she approaches adolescence. It would be cruel and inhuman for any other result to occur. Alexandra has forgotten the heartache and outright terror which filled her years in California. She acknowledges only one family— the Holdens.

Respondents pray that certiorari be denied.

DATED this 28th day of December, 1979, at Great Falls, Montana.

Respectfully submitted,

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APPENDIX

IN THE SUPREME COURT
OF THE STATE OF MONTANA

No. 14228

EMIL WENZ, et al.,

Plaintiffs and Respondents,

v.

DIANE SCHWARTZE, et al.,

Defendants and Appellants.

ORDER

PER CURIAM:

This Court having considered the petition for rehearing filed by appellants herein,

IT IS ORDERED the petition for rehearing is denied.

DATED this 11th day of September, 1979.

§ Frank I. Haswell
Chief Justice

§ Gene B. Daly

§ John Conway Harrison

§ Daniel J. Shea

§ John C. Sheehy
Justices